DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-10876
Title: Donald Bullcoming, Petitioner
v.
New Mexico
Docketed: May 19, 2010
Lower Ct: Supreme Court of New Mexico
Case Nos: (31,186)
Decision Date: February 12, 2010
Questions Presented

Date	Proceedings and Orders
May 12 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 18, 2010)
May 20 2010	Waiver of right of respondent New Mexico to respond filed.
Jun 9 2010	DISTRIBUTED for Conference of June 24, 2010.
Jun 21 2010	Response Requested. (Due July 21, 2010)
Jul 8 2010	Order extending time to file response to petition to and including August 20, 2010.
Aug 20 2010	Brief of respondent New Mexico in opposition filed.
Aug 31 2010	Reply of petitioner Donald Bullcoming filed.
Sep 2 2010	DISTRIBUTED for Conference of September 27, 2010.
Sep 28 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Oct 5 2010	Motion to appoint counsel filed by petitioner Donald Bullcoming.
Oct 20 2010	Motion DISTRIBUTED for Conference of November 5, 2010.
Nov 1 2010	The time to file the joint appendix and petitioner's brief on the merits is extended to and including November 29, 2010.
Nov 1 2010	The time to file respondent's brief on the merits is extended to and including January 10, 2011.
Nov 8 2010	Motion to appoint counsel filed by petitioner GRANTED. Jeffrey L. Fisher, Esquire, of Stanford, California, is appointed to serve as counsel for the petitioner in this case.
Nov 16 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Nov 18 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 23 2010	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including November 30, 2010.
Nov 30 2010	Joint appendix filed.
Nov 30 2010	Brief of petitioner Donald Bullcoming filed.
Dec 6 2010	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Dec 7 2010	Brief amicus curiae of Richard D. Friedman filed.
Dec 7 2010	Brief amici curiae of Public Defender Service for the District of Columbia, et al. filed.
Dec 7 2010	Brief amicus curiae of The Innocence Network filed.
Dec 7 2010	Brief amici curiae of Law Professors filed.
Dec 23 2010	SET FOR ARGUMENT ON Wednesday, March 2, 2011.
Jan 3 2011	CIRCULATED.
Jan 10 2011	Brief of respondent New Mexico filed. (Distributed)
Jan 17 2011	Brief amici curiae of California, et al. filed. (Distributed)

Jan 17 2011	Brief amici curiae of National District Attorneys Association, et al. filed. (Distributed)
Jan 18 2011	Brief amicus curiae of State of New Mexico Department of Health Scientific Laboratory Division filed. (Distributed)
Jan 26 2011	Record received from Eleventh Judicial District Court of New Mexico. (1 envelope)
Feb 9 2011	Reply of petitioner Donald Bullcoming filed. (Distributed)
Mar 2 2011	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. (Appointed by this Court.) For respondent: Gary K. King, Attorney General, Santa Fe, N. M.

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

No. 10-___

Supreme Court, U.S.
FILED
MAY 12 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Petition for a Writ of Certiorari
to the New Mexico Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....iii

PETITION FOR A WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

JURISDICTION.....1

RELEVANT CONSTITUTIONAL PROVISION.....1

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....7

I. The New Mexico Supreme Court's Decision Deepens the Conflict Over the Question Presented.....8

II. This Issue Is Important to the Proper Administration of Criminal Trials.....19

III. This Case is an Excellent Vehicle for Considering the Question Presented.....23

IV. The New Mexico Supreme Court's Decision Is Incorrect.....24

CONCLUSION.....27

APPENDIX A, Opinion of the Supreme Court of New Mexico.....1a

APPENDIX B, Opinion of the New Mexico Court of Appeals.....18a

APPENDIX C, District Court's Judgment and Sentence.....28a

APPENDIX D, State's Exhibit 1 (Report of Blood Alcohol Analysis)..31a & 32a

TABLE OF AUTHORITIES

Cases

Barba v. California, 129 S. Ct. 2857 (2009).....10

Blaylock v. Texas, 129 S. Ct. 2861 (2009).....9-10

Blaylock v. Texas, 259 S.W.3d 202 (Tex. Ct. App. 2008).....10

Briscoe v. Virginia, 657 S.E.2d 113 (Va. 2008), *cert. granted*, 129 S. Ct. 2858.....9,19

Chapman v. California, 386 U.S. 18 (1967).....24

Commonwealth v. Avila, 912 N.E.2d 1014 (Mass. 2009).....11

Commonwealth v. Nardi, 893 N.E.2d 1221 (Mass. 2008).....11

Crager v. Ohio, 129 S. Ct. 2856 (2009).....10

Crawford v. Washington, 541 U.S. 36 (2004).....*passim*

Davis v. Washington, 547 U.S. 813 (2006).....25

Fahy v. Connecticut, 375 U.S. 85 (1963).....24

Fields v. United States, 952 A.2d 859 (D.C.2008).....24

Hamilton v. State, 300 S.W.3d 14 (Tex. Ct. App. 2009).....13

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).....*passim*

Ohio v. Roberts, 448 U.S. 56 (1980).....26

O'Maley v. New Hampshire, 129 S. Ct. 2856 (2009).....10

Pendergrass v. Indiana, 913 N.E.2d 703 (Ind. 2009), No. 09-866.....2,16

People v. Barba, 2007 WL 4125230 (Cal. Ct. App. Dec. 21, 2007).....10

People v. Becker, 891 P.2d 153 (Cal. 1995).....21

People v. Bingley, 2009 WL 3595261 (Cal. Ct. App. Nov. 3, 2009).....14

People v. Cuadros-Fernandez, ___ S.W.3d ___, 2009 WL 2647890 (Tex. Ct. App. Aug. 28, 2009).....13

People v. Dendel, 2008 WL 4180292 (Mich. Ct. App. 2008), *vacated and remanded*, 773 N.W.2d 16 (Mich. 2009).....14

People v. Dungo, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted*,(Cal. Dec. 2, 2009).....13-14, 21-22

People v. Geier, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 285 (2009).10, 14

People v. Goldstein, 843 N.E.2d 727 (N.Y.2005), *cert. denied*, 547 U.S. 1159 (2006).....18

People v. Gutierrez, 99 Cal Rptr. 3d 369 (Cal. Ct. App. 2009), *rev. granted*,(Cal. Dec. 2, 2009).....14

People v. Horton, 2007 WL 2446482 (Mich. Ct.App. 2007), *rev. denied*, 772 N.W.2d 46 (Mich. 2009).....14

People v. Lewis, 2008 WL 1733718 (Mich. Ct. App. Apr. 15, 2008), *vacated and remanded* 772 N.W. 2d 47 (Mich. 2009).....14

People v. Lopez, 98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009), *rev. granted*, (Cal. Dec. 2, 2009).....14

People v. Lovejoy,919 N.E.2d 843 (Ill. 2009).....16-17

People v. Payne, 774 N.W.2d 714 (Mich. Ct. App. 2009).....13

People v. Raby, 2009 WL 839109 (Mich. Ct.App. 2009), *vacated and remanded*, 775 N.W.2d 144 (Mich. 2009).....14

People v. Rutterschmidt, 98 Cal. Rptr. 3d 390 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009).....14

Rector v. State, 681 S.E.2d 157 (Ga. 2009).....15

Roberts v. United States, 916 A.2d 922 (D.C. 2007)..... 17-18

State v. Bullcoming, 147 N.M. 487, 226 P.3d 1 (2010)..... 6

State v. Crager, 879 N.E. 2d 745 (Ohio 2007).....10

State v. Galindo, 683 S.E.2d 785 (N.C. Ct. App. 2009).....12

State v. Gomez, 2009 WL 3526649 (Ariz. Ct. App. Oct. 29, 2009).....19

State v. Johnson, 982 So. 2d 672 (Fla. 2008).....18

State v. Locklear, 681 S.E.2d 293 (N.C. 2009) 12

State v. Mungos, 957 A.2d 89 (Me. 2008).....18

State v. O'Maley, 932 A.2d 1 (N.H. 2007).....10

State v. Tucker, 160 P.3d 177 (Ariz.), *cert.denied*, 552 U.S. 923 (2007).....18-19

Tennessee v. Street, 471 U.S. 409 (1985).....17

United States v. Alvarado-Valdez, 521 F.3d 337 (5th Cir. 2008).....24

United States v. Johnson, 587 F.3d 625 (4th Cir. 2009).....18

United States v. Lane, 474 U.S. 438 (1986).....24

United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010)..... 13

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008).....17-18

United States v. Moon, 512 F.3d 359 (7th Cir.), *cert. denied*, 129 S.Ct. 40 (2008).....12

United States v. Taylor, 633 F. Supp. 2d 1170 (D.N.M. 2009).....22

United States v. Turner, ___F.3d___, 2010 WL 92489 (7th Cir. Jan. 12, 2010).....12-13

United States v. Washington, 498 F.3d 225 (4th Cir. 2007).....9

Washington v. United States, 129 S. Ct. 2856 (2009).....10

Wood v. State, 299 S.W.3d 200 (Tex. Ct. App. 2009).....13

Constitutional Authorities

U.S. Const. amend VI.....*passim*

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28 U.S.C. § 1257(a).....1

NMSA 1978, Section 66-8-102 (2005).....4

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Peters, Jeremy W., *Report Condemns Police Lab Oversight*, N.Y. Times, Dec. 18, 2009.....20

Smith, Scott, *S.J. Pathologist Under Fire Over Questionable Past*, THE RECORD, Jan. 7, 2007, @ http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070107/ANEWS/701070311#STS=g329z7h5.134t.....21

PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald Bullcoming respectfully petitions for a writ of certiorari to the New Mexico Supreme Court in *State v. Bullcoming*, No. 31,186 CR-05-937.

OPINIONS BELOW

The opinion of the New Mexico Supreme Court is published at 147 N.M. 487, 226 P.3d 1 (2010). The opinion of the New Mexico Court of Appeals is published at 144 N.M. 546, 189 P.3d 679 (Ct. App. 2008). The trial court's Judgment and Sentence is not published.

JURISDICTION

The opinion of the New Mexico Supreme Court was entered on February 12, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

This Court held in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without affording the accused an opportunity to "'be confronted with' the analysts at trial." *Id.* at 2532 (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). *State v. Bullcoming* raises the question of whether the prosecution complies with that holding by introducing forensic reports through the in-court testimony of someone, such as a supervisor, who did not perform or observe the testing discussed in the reports. In this case, the New Mexico Supreme Court upheld the practice.

This same question is raised in *Pendergrass v. Indiana*, 913 N.E.2d 703 (Ind. 2009), Supreme Court Docket No. 09-866 (Petition for Writ of Certiorari filed in this Court on Feb. 22, 2010).

1. At 4:24 p.m., when Mr. Bullcoming was driving his brother's truck, he bumped the back of another truck at a stop sign. There was only extremely slight damage to the other vehicle, and no damage to his truck. When this happened, he exchanged insurance information with Dennis Jackson, the other driver. Jackson noticed that Mr. Bullcoming smelled of alcohol and that his eyes were bloodshot.

Mr. Bullcoming walked away (left his passengers and the truck) when Jackson told him that the police had been called.

According to Mr. Jackson, shortly after an officer arrived at the scene, Mr. Bullcoming was returned to the accident scene in another patrol car. Mr. Jackson admitted he was not timing the events that day and that "time means nothing." He did notice, however, that due to the minor accident, he was fifty (50) minutes late meeting his family in Durango, Colorado.

Mr. Bullcoming testified that he was *not* drunk when he was driving. There may have been an odor of alcohol in the car he said, but the odor was not from him. He said that he left the accident scene before the police arrived because he had a warrant out for his arrest in Oklahoma. He said that he walked across the street going north, and went down a hill where there was a creek and trees. He met up with some Native American men, and he drank heavily with them—they finished off a half-gallon of vodka. When the officer on the motorcycle found him, it was about forty-five minutes after the accident.

Mr. Bullcoming was given his field sobriety tests when he was brought back to the scene in a patrol car, which he failed, and a blood alcohol test, two hours after the point in time when he was driving. At 6:35 p.m., when his blood alcohol was tested, it was .21. (*See Appendix D*: State's Exhibit 1--Report of Blood Alcohol Analysis).

2. The State charged petitioner with one count of aggravated Driving While Intoxicated (DWI), a fourth degree felony, contrary to NMSA 1978, Section 66-8-102 (2005, prior to amendments through 2008). Petitioner denied the charge and sought to prove that he drank after he was driving.

The day before the trial defense counsel filed a written motion to exclude State's witnesses because she had only been notified that morning by facsimile that the State intended to call three new witnesses: 1) Dennis Jackson, 2) a blood analyst, and 3) the nurse who withdrew Mr. Bullcoming's blood. Defense counsel believed the State was only going to call the three officers that were listed in the State's Notice of Disclosure filed 10/27/05. The court refused to exclude the witnesses who were disclosed that day, but offered her a continuance to interview them. Mr. Bullcoming chose to go to trial the next day.

Defense counsel again moved to exclude the testimony of the blood analyst at trial the next day, stating that she had made her record the day before about the late disclosure of this witness. Defense counsel also objected to the blood analysis evidence because the analyst who performed the test was not at trial to testify about the test. Defense counsel argued that she did not want another analyst to testify about the test, and about a report he had not prepared, because it would violate Mr. Bullcoming's constitutional right to confrontation. The court found that the lab result of Mr. Bullcoming's blood/alcohol test was a business record that

was not prohibited by *Crawford v. Washington*, 541 U.S. 36 (2004).

Defense counsel disagreed with the court and countered that it was a "business record prepared in anticipation of litigation." Counsel added that she did not know that the analyst who had performed the test was not available. If she had known this, she said, her defense would have been different.

The witness, Gerasimos Razatos, testified that he is an analyst and that he helps to oversee the breath and blood alcohol programs for the New Mexico Department of Health Scientific Laboratory Division, Toxicology Bureau. He stated that the analyst who had performed the test was on unpaid leave. Razatos did not perform the test in this case, nor was he the "reviewer" on the report. *See Appendix D*: State's Exhibit 1.

When Razatos testified about Mr. Bullcoming's blood analysis, defense counsel objected again to the admission of the report and to his testimony. Over objection, he testified about the lab's standard operating procedures and, based on the written report, he discussed the chain of custody in this case. When the witness was asked about alcohol metabolism and whether he had expertise in that area, defense counsel objected again. The witness stated his opinion that a blood test and a breath test were equally accurate. Based on the other analyst's report, the witness stated that Mr. Bullcoming had .21 grams of alcohol per one hundred milliliters of blood in his system at 6:25 p.m. The jury convicted petitioner of

aggravated DWI. The trial court sentenced him to two years in prison.

3. The New Mexico Court of Appeals affirmed. It upheld the trial court's ruling that the forensic report was a business record that was not prohibited by *Crawford v. Washington*, 536 U.S. 36 (2004). It decided that a blood alcohol report is admissible as a public record and that it presented no issue under the Confrontation Clause because the report was non-testimonial.

4. The New Mexico Supreme Court granted discretionary certiorari review. While the case was pending, this Court issued its decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), clarifying that forensic laboratory reports are testimonial under *Crawford*. Eight months later, the New Mexico Supreme Court held that the blood alcohol report was testimonial evidence, but it was admissible even though the forensic analyst who performed the test did not testify.

Relying on the rule that "the Confrontation Clause permits the admission of testimonial evidence so long as *'the declarant* is present at trial to defend or explain it,' ¶ 19 (quoting *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (emphasis added)), the New Mexico Supreme Court held that the prosecution's surrogate forensic testimony satisfied the Clause. *State v. Bullcoming*, 147 N.M. 487, 226 P.3d 1 (2010). In the New Mexico Supreme Court's view, the prosecution may introduce a forensic report authored by a nontestifying analyst so long as a different "qualified" forensic witness is "available for cross-examination"

regarding the operation of the forensic machine at issue, the laboratory's procedures, and the results reported in the forensic report.

According the New Mexico Supreme Court, the supervisor who had no involvement in the specific test could testify because the analyst who prepared the blood alcohol report was a mere scrivener and Petitioner's true accuser was the gas chromatograph machine which detected the presence of alcohol in Petitioner's blood, accessed Petitioners BAC level, and generated a computer print-out listing its results. *Bullcoming*, ¶¶ 19-20.

REASONS FOR GRANTING THE WRIT

State high courts and federal courts of appeals are deeply and intractably divided over whether the Confrontation Clause, as explicated in *Crawford v. Washington*, 536 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), allows the government to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst who did not perform or observe the laboratory analysis described in the statements. This Court should use this case to resolve this escalating conflict. Forensic evidence plays a central role in many criminal prosecutions. Allowing surrogate analyst testimony prevents scrutiny of the actual analyst's "honesty, proficiency, and methodology," *Melendez-Diaz*, 129 S. Ct. at 2538, in the form guaranteed by the

Sixth Amendment: live testimony in front of the accused and the trier of fact, with an opportunity for cross-examination. As such, the New Mexico Supreme Court's holding below – that the Confrontation Clause was satisfied by allowing the defendant to cross-examine someone other than the author of the report the prosecution introduced – is incorrect.

I. The New Mexico Supreme Court's Decision Deepens The Conflict Over The Question Presented.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant, or unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. Five years later, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), this Court clarified that forensic laboratory reports are testimonial evidence. *Id.* at 2532. Accordingly, this Court held that the prosecution violates the Confrontation Clause when it introduces a nontestifying analyst's forensic laboratory report through the testimony of a police officer.

This Court further indicated that two important, but distinct, questions concerning forensic evidence must be resolved to implement *Melendez-Diaz*. The

first is whether a state satisfies the Confrontation Clause if it requires defendants to do more than simply demand that the prosecution put an analyst on the stand in order to introduce the contents of a forensic report. *See Melendez-Diaz*, 129 S. Ct. at 2541 n.12. When this Court decided *Melendez-Diaz*, one case touching on this issue was pending on a petition for a writ of certiorari, *Briscoe v. Virginia*, 657 S.E.2d 113 (Va. 2008), *cert. granted*, 129 S. Ct. 2858. This Court immediately granted the petition and is hearing the case this Term.

The second issue concerns whether the prosecution satisfies the Confrontation Clause whenever it calls *some* forensic analyst to the stand. *See Melendez-Diaz*, 129 S. Ct. at 2532 n.1; *id.* at 2444-46 (Kennedy, J., dissenting). When this Court decided *Melendez-Diaz*, several cases touching on this issue – that is, cases in which the courts found no confrontation violations at least in part because the prosecution had called at least some forensic expert to the stand – were pending on petitions for writs of certiorari.

The cases fell into three categories. First, some cases involved scenarios in which the prosecution introduced forensic reports while an analyst was on the stand, but those reports were simply machine print-outs and thus were nontestimonial. *See United States v. Washington*, 498 F.3d 225 (4th Cir. 2007) (Supreme Court docket No. 07-829 1); *Blaylock v. Texas*, 259 S.W.3d 202 (Tex. Ct. App. 2008) (No. 08-8259). Second, one case involved a scenario in which a

laboratory supervisor testified based in part on someone else's forensic reports, but the supervisor never repeated anything in the reports and the prosecution never introduced them into evidence; instead, the supervisor limited himself to stating his own conclusions without revealing their underlying basis. *State v. O'Maley*, 932 A.2d 1 (N.H. 2007) (No. 07-7577). Third, some cases involved scenarios in which the prosecution introduced nontestifying analysts' forensic reports through the in-court testimony of a different forensic analyst. *People v. Barba*, 2007 WL 4125230 (Cal. Ct. App. Dec. 21, 2007) (unpublished) (No. 07-11094); *State v. Crager*, 879 N.E. 2d 745 (Ohio 2007) (No. 07- 10191).

This Court denied certiorari in the first two categories of cases, leaving in place their holdings that the Confrontation Clause had not been violated.[1] But this Court granted, vacated, and remanded the two cases in the third category – the cases that had held that the prosecution could introduce one forensic analyst's testimonial statements through the in-court testimony of another.[2] A split among state supreme courts and a federal court of appeals has quickly developed

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[1] *See Washington v. United States*, 129 S. Ct. 2856 (2009); *Blaylock v. Texas*, 129 S. Ct. 2861 (2009); *O'Maley v. New Hampshire*, 129 S. Ct. 2856 (2009).

[2] *See Barba v. California*, 129 S. Ct. 2857 (2009); *Crager v. Ohio*, 129 S. Ct. 2856 (2009). This Court denied certiorari in one other case involving this fact pattern: *People v. Geier*, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009) (No. 07-7770). However, the California Supreme Court had held that even if a Confrontation Clause violation had occurred, any error was harmless. *Geier*, 161 P.3d. at 140.

concerning this issue, which in fact deepens a preexisting conflict on the question. That is the issue this case presents.

1. In the wake of *Melendez-Diaz*, two state supreme courts and two federal courts of appeals have held that the Confrontation Clause prohibits what might be called "surrogate" forensic testimony – that is, introducing one forensic analyst's testimonial statement through the in-court testimony of another. In *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009), the defendant argued that the prosecution violated the Confrontation Clause by permitting one forensic analyst "to recite [another's] findings and conclusions on direct examination." *Id.* at 1027. Drawing on its earlier decision in *Commonwealth v. Nardi*, 893 N.E.2d 1221 (Mass. 2008), which had held that a testifying analyst in such a scenario is "plainly . . . asserting the truth of" the nontestifying analyst's findings in a manner that triggers the defendant's constitutional right to confrontation, *id.* at 1232-33, the court held that *Melendez-Diaz* and *Crawford* require a testifying "expert witness's testimony [to be] confined to his or her own opinions." *Avila*, 912 N.E.2d at 1029. When a forensic examiner, "as an expert witness . . . recite[s] or otherwise testifies on direct examination] about the underlying factual findings of [an] unavailable [forensic analyst] as contained in [his forensic] report," the prosecution transgresses the Confrontation Clause. *Id.* at 1029.

Similarly, in *State v. Locklear*, 681 S.E.2d 293, 304-305 (N.C. 2009), the prosecution introduced two forensic analysts' reports through the in-court testimony of a third analyst. Reciting *Crawford*'s basic rule that "[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless *the declarant* is unavailable to testify and the accused has had a prior opportunity to cross-examine *the declarant*," the North Carolina Supreme Court held that introducing one forensic analyst's report through the live testimony of a different analyst "violate[s a] defendant's constitutional right to confront the witnesses against him." *Id.* at 304-05 (emphasis added); *see also State v. Galindo*, 683 S.E.2d 785 (N.C. Ct. App. 2009) (finding confrontation violation where supervisor testified concerning someone else's forensic analysis).

The Seventh Circuit likewise has held that although a surrogate forensic analyst may testify based on raw data someone else generated, the "conclusions" of the nontestifying analyst who performed the testing are testimonial statements that must be "kept out of evidence." *United States v. Moon*, 512 F.3d 359, 362 (7th Cir.), *cert. denied*, 129 S. Ct. 40 (2008). Reaffirming that ruling in a case after *Melendez-Diaz*, the Seventh Circuit held that a forensic analyst's testimony based on forensic tests that another analyst performed did not violate the Confrontation Clause because "[the second analyst's] report was not admitted into evidence." *United*

States v. Turner, ___ F.3d ___, 2010 WL 92489, at *5 (7th Cir. Jan. 12, 2010). The Confrontation Clause would have been violated if the testifying analyst had "not [been] involved in the testing process" at issue and the prosecution had introduced the second analyst's certificate of analysis. *Id.* at *4-*5.

In *United States v. Martinez-Rios*, 595 F.3d 581 (5th Cir. 2010), the prosecution introduced a certificate asserting that the defendant had never received written permission to enter the United States. Instead of putting the person who authored the certificate on the stand, the prosecution presented live testimony from a different "records analyst," who had reviewed the file and who explained on the stand "how [the kind of certificate at issue] is ordinarily prepared." *Id.* at *4. The Fifth Circuit held that such surrogate testimony violated the Confrontation Clause, reasoning that the defendant was "unable to cross-examine the person who had prepared a testimonial statement to be used against him at trial." *Id.*

Intermediate courts in three large states – Texas, Michigan, and California – have likewise held that surrogate forensic testimony violates the Confrontation Clause. *See People v. Payne*, 774 N.W.2d 714 (Mich. Ct. App. 2009); *Wood v. State*, 299 S.W.3d 200 (Tex. Ct. App. 2009); *Hamilton v. State*, 300 S.W.3d 14 (Tex. Ct. App. 2009); *People v. Cuadros-Fernandez*, ___ S.W.3d ___, 2009 WL 2647890 (Tex. Ct. App. Aug. 28, 2009); *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted*

(Cal. Dec. 2, 2009); *People v. Lopez*, 98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009).[3] Moreover, while the Michigan Supreme Court has not ruled on the issue, it has denied review in a case holding that surrogate forensic testimony violated the Confrontation Clause and has vacated and remanded three decisions that condoned such testimony. *Compare People v. Horton*, 2007 WL 2446482 (Mich. Ct. App. 2007), *rev. denied*, 772 N.W.2d 46 (Mich. 2009), *with People v. Raby*, 2009 WL 839109 (Mich. Ct. App. 2009), *vacated and remanded*, 775 N.W.2d 144 (Mich. 2009); *People v. Dendel*, 2008 WL 4180292 (Mich. Ct. App. 2008), *vacated and remanded*, 773 N.W.2d 16 (Mich. 2009); *and People v. Lewis*, 2008 WL 1733718 (Mich. Ct. App. Apr. 15, 2008), *vacated and remanded*, 772 N.W.2d 47 (Mich. 2009). These post-*Melendez-Diaz* orders strongly suggest that the Michigan Supreme Court views the practice of surrogate forensic testimony as

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[3] Two reported California Court of Appeals opinions have reached a contrary result, reasoning that the California Supreme Court's pre-*Melendez-Diaz* decision in *People v. Geier*, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), dictates that "contemporaneously created" forensic reports are not testimonial and that surrogate forensic testimony does not violate the Confrontation Clause. *See People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-12 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People v. Gutierrez*, 99 Cal Rptr. 3d 369 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *accord People v. Bingley*, 2009 WL 3595261 (Cal. Ct. App. Nov. 3, 2009). As explained *supra* in footnote 2, however, this Court's denial of certiorari in *Geier* is readily explainable by the California Supreme Court's alternative harmless-error holding. Indeed, the State of California itself conceded in *Dungo* that "the reasoning in *Melendez-Diaz* undermines some of the rationale of *People v. Geier*," and the State withdrew its "argument that the autopsy report [was] not testimonial because it constitutes a 'contemporaneous recordation of observable events.'" 98 Cal. Rptr. 3d at 711 n.11 (quoting state's supplemental letter brief).

untenable.

2. In direct contrast, three state high courts have held that introducing one forensic analyst's testimonial statement through the in-court testimony of another forensic analyst does not violate the Confrontation Clause.

a. Two state supreme courts have reasoned that surrogate forensic testimony satisfies the Confrontation Clause because it gives defendants the opportunity to cross-examine someone who is generally knowledgeable about the analyses involved, even if not the analyst who authored the forensic reports the prosecution seeks to introduce. In this case, the New Mexico Supreme Court followed this theory. At least when the live witness the prosecution chooses is familiar with the laboratory procedures and the operation of the gas chromatograph machine, in the New Mexico Supreme Court's view, the admission of the report by a non-testifying analyst does not violate the Confrontation Clause. ¶ 20.

The Georgia Supreme Court has also adopted the "good enough to suffice" rationale. *See Rector v. State,* 681 S.E.2d 157 (Ga. 2009). So long as a forensic analyst whom the prosecution puts on the stand has "reviewed the data and testing procedures to determine the accuracy" of another analyst's report, the testifying analyst may tell the jury the absent analyst's conclusions and say that he endorses them. *Id.* at 160.

The opinion of the Indiana Supreme Court in *Pendergrass v. Indiana*, 913 N.E.2d 703 (Ind. 2009), *petition for cert. filed* (U.S. Feb. 22, 2010) (No. 09-866), held that at least when the live witness the prosecution chooses is familiar with the laboratory as well as with the analyst who authored the report at issue, that surrogate supervisor witness "suffice[s] for Sixth Amendment purposes." *Id.* at 708. In *Pendergrass*, over petitioner's continuing objection, the supervisor testified concerning a DNA analyst's laboratory reports. The supervisor explained that as the police laboratory's supervisor, she had reviewed and initialed the actual analyst's work. But the supervisor's testimony concerning the DNA analysis consisted solely of repeating the actual analysts' assertions made in the reports themselves.

b. The Illinois Supreme Court has held that forensic analysts, as expert witnesses, can repeat testimonial statements of nontestifying analysts on the theory that such statements, even when the sole basis for the experts' opinions, are not offered for the truth of the matter asserted. *People v. Lovejoy*, 919 N.E.2d 843 (Ill. 2009). In *Lovejoy*, a medical examiner testified that another toxicologist detected six different types of drugs in the victim's body after conducting blood tests, indicating that poisoning caused the victim's death. *Id.* at 866-868. Relying on footnote nine in *Crawford*, which reaffirmed that the Confrontation Clause is not implicated

when out-of-court statements are introduced for reasons other than establishing the truth of the matter asserted, the Illinois Supreme Court held that the medical examiner's testimony repeating the nontestifying analyst's conclusions was not admitted for its truth but rather was introduced "to show the jury the steps [the examiner] took prior to rendering an expert opinion in th[e] case." *Id.* at 867-868 (citing *Crawford*, 541 U.S. at 59 n.9).[4]

3. The post-*Melendez-Diaz* conflict concerning surrogate forensic testimony deepens a pre-existing split over whether, as a more general matter, testimonial statements of a nontestifying witness can be introduced through the in-court testimony of an expert witness.

The Second Circuit, three state supreme courts, and the District of Columbia's highest court have held that introducing the testimonial statements of a nontestifying witness through the in-court testimony of an expert witness violates the Confrontation Clause. *See United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008) (admission of testimonial statements through the in-court testimony of a

[4] Footnote nine in *Crawford* referenced *Tennessee v. Street*, 471 U.S. 409 (1985), reaffirming that the Confrontation Clause is not implicated when the prosecution offers hearsay (even testimonial hearsay) for a purpose other than establishing the truth of the matter asserted. In *Street*, the defendant argued that his confession was false because the police had simply given him the confession of his alleged accomplice and told him to repeat it. *Id.* at 411-12. The prosecution countered by introducing the nontestifying accomplice's confession to show that it differed in material ways from the defendant's. Because the accomplice's confession was not offered for its truth, this did not violate the Confrontation Clause. *Id.* at 417.

gang expert); *Roberts v. United States*, 916 A.2d 922 (D.C. 2007) (admission of forensic laboratory reports through DNA expert's testimony); *State v. Johnson*, 982 So. 2d 672 (Fla. 2008) (admission of lab report through supervisor's testimony); *State v. Mungos*, 957 A.2d 89 (Me. 2008) (admission of statements concerning creation of DNA swabs through supervisor); *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005) (admission of testimonial statements through psychologist's testimony), *cert. denied*, 547 U.S. 1159 (2006).[5]

In contrast, in *State v. Tucker*, 160 P.3d 177 (Ariz. 2007), *cert. denied*, 552 U.S. 923 (2007), a prosecutorial expert witness (a "materials expert") repeated statements on the stand that another, nontestifying expert had told him in an investigatory interview.[6] The Arizona Supreme Court did not dispute that the nontestifying expert's statements were testimonial. But the court refused to find a *Crawford* violation, reasoning that "a testifying expert witness may, for the limited purpose of showing the basis of his or her opinion, reveal the substance of a non-testifying expert's statements." *Id.* at 193. "Such statements do not violate

[5] The Fourth Circuit, in an opinion by Judge Wilkinson, recently agreed with the Second Circuit's *Mejia* decision, explaining that "[a]llowing a [prosecution] witness simply to parrot out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion would provide an end run around *Crawford*." *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). But the Fourth Circuit held that the Confrontation Clause was not violated in the case it was considering because the expert did not repeat or refer to any testimonial statements to the jury.

[6] The petition for certiorari in *Tucker* did not raise this Confrontation Clause issue.

the Confrontation Clause," the court continued, "because they are not admissible for their truth." *Id.*

The Arizona Court of Appeals has applied *Tucker* following *Melendez-Diaz* to hold that the prosecution may present an expert forensic analyst to testify concerning the results of tests performed by others. *State v. Gomez*, 2009 WL 3526649, at *4-5 (Ariz. Ct. App. Oct. 29, 2009).

4. Although *Melendez-Diaz* is a recent decision, this conflict over surrogate testimony is now firmly entrenched and ripe for resolution. The split among state high courts and the federal courts of appeals now stands at nine-to-five. There is no prospect that this split will resolve itself, nor any reason to believe that further percolation or anything this Court says in its forthcoming *Briscoe* decision will reveal any new arguments or considerations relevant to the dispute.[7]

II. This Issue Is Important To The Proper Administration Of Criminal Trials.

This Court should not allow the conflict over surrogate witnesses to persist.

1. The question presented implicates practices in several states across the country. Crime laboratory analyses play a central evidentiary role in a

[7] Of course, if this Court, out of an abundance of caution, wishes to hold this case pending the outcome in *Briscoe*, petitioner would have not objection to that.

large number of criminal trials, and prosecutors in numerous jurisdictions rely on surrogate witnesses to present the analysis of nontestifying analysts. Prosecutors, defense lawyers, and judges need to know as soon as possible whether surrogate testimony satisfies the Confrontation Clause.

2. The question presented also directly implicates the truth-seeking function of trial. As this Court noted in *Melendez-Diaz*, forensic reports, just like other *ex parte* testimony created by law enforcement agents, presents "risks of manipulation." 129 S. Ct. at 2536. Indeed, investigative boards, journalists, and interest groups have documented numerous recent instances of fraud and dishonesty in our nation's forensic laboratories. *Id.* at 2536-38.[8] This Court also has recognized that "a forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz*, 129 S. Ct. at 2536. Even an entirely honest and objective forensic analyst may suffer from a "lack of proper training or deficiency in judgment," *id.* at 2537, or may place undue analytical weight on a suspect methodology, *id.* at 2538. Surrogate witnesses fail to address – and may actually aggravate – the problems posed by an analyst's

[8] For the most recent such example, see Jeremy W. Peters, *Report Condemns Police Lab Oversight*, N.Y. Times, Dec. 18, 2009 (describing "pervasively shoddy forensics work," as well as routinely "falsified test results," over a fifteen year period in the New York State crime laboratory).

potential fraud, incompetence, or flawed methodology. A recent case from California vividly illustrates the point. In *People v. Dungo,* 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal.8 Dec. 2, 2009) the prosecution introduced an autopsy report to prove that a certain amount of time had elapsed before the victim's death, a hotly contested issue at trial. The medical examiner who had authored the report, however, had since been fired. He had also been forced to resign "under a cloud" from another job, and was blacklisted by law enforcement in two more counties for falsifying his credentials. *Id.* at 704. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler,* 891 P.2d 153, 168 (Cal. 1995); Scott Smith, *S.J. Pathologist Under Fire Over Questionable Past,* THE RECORD, Jan. 7, 2007, @ http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070107/A_NEWS/70070311#STS_g329z7h5.134t.

In light of this problematic track record, the prosecution in *Dungo* put the medical examiner's supervisor on the stand instead of the examiner. As the supervisor explained during the preliminary hearing, "[t]he only reason they won't use [the examiner himself] is because the law requires the District Attorney to provide this background information to each defense attorney for each case, and [the prosecutors] feel it becomes too awkward to make them easily try their cases." *Dungo,* 98 Cal. Rptr. 3d at 708 (alterations in original). The California Court of

Appeals held that this surrogate testimony violated *Crawford*, observing that the "prosecution's intent" had been to "prevent[] the defense from exploring the possibility that the [medical examiner] lacked proper training or had poor judgment or from testing [his] 'honesty, proficiency, and methodology.'" *Id.* at 714 (quoting *Melendez-Diaz*, 129 S. Ct. at 2538).

Even in cases seemingly involving less dramatic facts, allowing surrogate testimony would effectively insulate forensic analysts' work from scrutiny. In the field of ballistics and toolmark analysis, even good faith forensic conclusions "involve subjective qualitative judgments by examiners, and [] the accuracy of the examiners' assessments is highly dependent on their skill and training." *United States v. Taylor*, 633 F. Supp. 2d 1170, 1177-1178 (D.N.M. 2009) (quoting Committee on Identifying the Needs of the Forensic Sciences Community; Committee on Applied and Theoretical Statistics, National Research Council, *Strengthening Forensic Sciences in the United States: A Path Forward*, 5-20 (2009). Yet there is little hope for defense counsel to find out through questioning supervisors which ballistics and toolmark reports are faulty; only questioning the analysts who authored incriminating reports can reveal whether the analysts actually understand the science at issue and whether they exercised appropriate care and followed necessary protocols in reaching their conclusions.

III. This Case Is An Excellent Vehicle For Considering The Question Presented.

This case presents an excellent vehicle for resolving the split of authority over the question presented.

1. This case raises the question presented free from any waiver or collateral review complications. It comes to this Court on direct review, and petitioner clearly and unambiguously objected at trial, arguing that the introduction of the forensic report through the testimony of a witness other than the one who authored the report violated the Confrontation Clause. Petitioner also preserved this issue by contending at each level of the New Mexico appellate courts that the admission of the analyst's reports violated the Sixth Amendment. Finally, the New Mexico courts resolved this issue on the merits.

2. This case clearly and cleanly presents the question of whether the prosecution may introduce one forensic analyst's testimonial statements through the testimony of a different forensic analyst. The forensic report at issue is unquestionably testimonial under *Melendez-Diaz,* and the statements in the report were unquestionably relayed to the jury. In fact, the prosecution introduced the report directly into evidence. Moreover, the shortcomings of using a surrogate witness were perfectly encompassed because the supervisor did not review the actual analyst's underlying

data, nor was he the reviewer of the report. *See Appendix D.*

3. Finally, the forensic report at issue played a central role at trial. If this Court concludes that petitioner's confrontation rights were violated, he would be entitled to a new trial.[9]

IV. The New Mexico Supreme Court's Decision Is Incorrect.

1. The New Mexico Supreme Court erred in holding that the government may introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst. The Sixth Amendment guarantees a defendant the right "to be confronted with *the* witnesses against him." U.S. Const. amend VI. The use of the definite article in this constitutional provision is not adventitious. Instead, it dictates that if the State decides to introduce testimonial evidence, it must afford the defendant the opportunity be confronted with the specific creator of that evidence – that is, the person who actually made the statement or authored the document at issue. *Crawford v.*

[9] The State may argue that the admission of the report was harmless error. An assessment of "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of" cannot establish harmless error. *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963); *see also United States v. Lane*, 474 U.S. 438, 450 n.13 (1986) ("[T]he harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry.") (internal quotation marks and citation omitted). Rather, "the government must demonstrate beyond a reasonable doubt that the tainted evidence did not contribute to the conviction." *United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008); *accord Fields v. United States*, 952 A.2d 859, 867-68 (D.C. 2008); *see generally Chapman v. California*, 386 U.S. 18 (1967). (emphasis added).

Washington, 541 U.S. 36, 68 (2004). Accordingly, this Court has repeatedly held that the government violates the Confrontation Clause if it introduces a witness's testimonial statements through the in-court testimony of a different person, such as a police officer. *See id.*; *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz*, 129 S. Ct. at 2532; *id.* at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . .").

Nothing about the status of an in-court witness as a forensic supervisor or similar type of person alters this analysis. It is true that a supervisor may be a competent witness to answer general questions regarding someone else's forensic declarations, such as systemic problems with the laboratory processes that the person used. But the Confrontation Clause guarantees more than that. As this Court explained in *Melendez-Diaz*, the Clause guarantees an opportunity to test the "honesty, proficiency, and methodology" of the actual author of a forensic report that the prosecution seeks to introduce into evidence. 129 S. Ct. at 2538. Indeed, an analyst "who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis" and "weed out . . . incompetent [analysts] as well." *Id.* at 2537

(citations omitted).

The holding of *Melendez-Diaz*, in fact, effectively resolves the question presented here. There, this Court explained that "[a] witness's testimony against a defendant is . . . inadmissible unless *the witness* appears at trial or, if *the witness* is unavailable, the defendant had a prior opportunity for cross-examination." 129 S. Ct. at 2531 (emphasis added); *see also id.* at 2532 ("petitioner was entitled to 'be confronted with' *the analysts* at trial") (emphasis added); *id.* at 2537 n.6 ("The analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation . . . .") (emphasis added). The inescapable implication of this holding – as even the dissent acknowledged – is that the analyst who wrote "those statements that are actually introduced into evidence" must testify at trial. 129 S. Ct. at 2545 (Kennedy, J., dissenting). Surrogate forensic testimony does not satisfy the Confrontation Clause.

2. Neither of the rationales that courts have offered for avoiding this straightforward conclusion withstands scrutiny.

The New Mexico Supreme Court's reasoning – to allow an analyst to testify who has not performed the actual test – "is little more than an invitation to return to [this Court's] overruled decision in [*Ohio v. Roberts*, 448 U.S. 56 (1980)]." *Melendez-Diaz*, 129 S. Ct. at 2536. But *Crawford* does not simply require an opportunity for

cross-examination of *someone* who can discuss, or even vouch for, the reliability of the testimonial evidence introduced. It requires the prosecution to make the declarant of testimonial evidence available for cross-examination, so the defendant can probe the reliability of the declarant's statements directly. *Crawford*, 541 U.S. at 61. Hence, as a leading treatise explains, "*Crawford*'s language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial." D.H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE-EXPERT EVIDENCE § 3.10.3, at 57 (Supp. 2009). This Court should not allow the New Mexico Supreme Court's decision to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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May 12, 2010

OPPOSITION BRIEF

AUG 20 2010
APPELLATE DIVISION

No. 09-40876

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

DONALD BULLCOMING,
Petitioner,
v.
STATE OF NEW MEXICO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

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August 20, 2010

QUESTION PRESENTED FOR REVIEW

Whether the Confrontation Clause prohibits the admission into evidence of machine-produced raw data that is recorded in an unsworn document by a non-testifying laboratory analyst acting as a "mere scrivener" and is introduced through the live testimony of an expert subject to cross-examination who is knowledgeable about the machine and the laboratory's procedures

TABLE OF CONTENTS

QUESTION PRESENTED

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. THE NEW MEXICO SUPREME COURT CORRECTLY HELD THAT *MELENDEZ-DIAZ* DOES NOT APPLY TO THE INTRODUCTION OF RAW DATA RECORDED, WITHOUT INTERPRETATION, BY A NONTESTIFYING ANALYST 6

II. NO CONFLICT EXISTS AMONG FEDERAL CIRCUITS AND STATE COURTS OF LAST RESORT REGARDING THE ADMISSION OF A LABORATORY REPORT CONTAINING RAW DATA 10

III. THE DOCUMENT IN THIS CASE IS NOT TESTIMONIAL BECAUSE IT WAS NOT PREPARED UNDER OATH 17

CONCLUSION 25

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

California v. Green, 399 U.S. 149 (1970) 7

Crawford v. Washington, 541 U.S. 36 (2004) ..... *passim*

Danforth v. Minnesota, 552 U.S. 264 (2008) 6

Davis v. Washington, 547 U.S. 813 (2006) ..... *passim*, 22

Giles v. California, 128 S. Ct. 2678 ..... 21, 18

(2008) *Giorgi v. Georgia*, 428 U.S. 153 6

(1970) *Lacomba v. California*, 314 U.S. 219 (1941) *Malloy v. Hogan*, 378 U.S. 1 (1964)

Mattox v. United States, 156 U.S. 237 ..... 6, 24

(1895) 6

McDonald v. City of Chicago, 130 S.Ct. 3020 (2010) ..... 23, *passim*

Medina v. California, 505 U.S. 437 ..... 7, 8, 20

(1992) *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) *Ohio v. Roberts*, 448 U.S. 56 (1980) 6, 23, 7

Pointer v. Texas, 380 U.S. 400 (1965) .....

United States v. Owens, 484 U.S. 554 (1988) .....

United States v. Perchieman, 32 U.S. (7 Pet.) 51 (1833) 10

White v. Illinois, 502 U.S. 346 (1992) 19, 20

UNITED STATES DISTRICT COURT AND COURT OF APPEALS CASES:

United States v. Darden, 656 F. Supp. 2d 560 (D. Md. 2009) 15

United States v. Moon, 512 F.3d 359 (7th Cir.),
cert. denied, 129 S. Ct. 39, *and cert. denied*, 129 S. Ct. 40 (2008) 14

United States v. Turner, 591 F.3d 928 (7th Cir. 2010) 13, 11

United States v. Washington, 498 F.3d 225 (4th Cir. 2007),
cert. denied, 129 S. Ct. 2856 (2009) 13,14

OTHER CASES:

Commonwealth v. Avila, 912 N.E.2d 1014 (Mass. 2009) 16, 22

Gardner v. United States, No. 07-CF-573, 2010 D.C. App. Lexis 351
(D.C. July 8, 2010) 11

Hamilton v. State, 300 S.W.3d 14 (Tex. App. 2009) 15

Marshall v. State, 232 P.3d 467 (Okla. Crim. App. 2010) 16, 22

Martinez v. State, 311 S.W.3d 104 (Tex. App. 2010) 17

Pendergrass v. State, 913 N.E.2d 703 (Ind. 2009),
cert. denied, 130 S. Ct. 3409 (June 14, 2010) 16, 11

People v. Brown, 918 N.E.2d 927 (N.Y. 2009) 15

People v. Dungo, 98 Cal. Rptr. 3d 702 (Ct. App.),
review granted, 220 P.3d 240 (Cal. 2009) 17

People v. Rutterschmidt, 98 Cal. Rptr. 3d 390 (Ct. App.),
review granted, 220 P.3d 239 (Cal. 2009) 16

11,

People v. Webster, No. 287478, 2010 Mich. App. Lexis 1195 (Mich. Ct. App. June 29, 2010) (unpublished) 11

People v. Williams, No. 107550, 2010 Ill. Lexis 971 (Ill. July 15, 2010) 11, 16

Rector v. State, 681 S.E.2d 157 (Ga.), *cert. denied*, 130 S. Ct. 807 (2009) 11, 16

Smith v. State, 28 So. 3d 838 (Fla. 2010), *petition for cert. filed*, No. 09-10755 (May 10, 2010) 11, 14

State v. Appleby, 221 P.3d 525 (Kan. 2009) 14, 15

State v. Aragon, 225 P.3d 1280 (N.M. 2010) ..... *passim*

State v. Bullcoming, 189 P.3d 679 (N.M. Ct. App. 2009) 4

State v. Bullcoming, 226 P.3d 1 (N.M. 2010) 4

State v. Dedman, 102 P.3d 628 (N.M. 2004) 4

State v. Dilboy, 160 N.H. 135 (2010) 16, 17, 21

State v. Estrada-Lopez, 927 N.E.2d 1147 (Ohio Ct. App.), *review granted*, 930 N.E.2d 331 (Ohio July 21, 2010) 11, 16

State v. Hough, 690 S.E.2d 285 (N.C. Ct. App. 2010) 11, 17

State v. Locklear, 681 S.E.2d 293 (N.C. 2009) 17

State v. Lui, 221 P.3d 948 (Wash. Ct. App. 2009), *review granted*, 228 P.3d 17 (Wash. 2010) 22

State v. Mitchell, 2010 ME 73, 2010 Me. Lexis 76 (Aug. 5, 2010) 22

State v. Snelling, No. CR 08-0164 AP, 2010 Ariz. Lexis 38
(Ariz. Aug. 9, 2010) 11, 16
State v. Tindell, No. E2008-02635-CCA-R3-CD,
2010 Tenn. Crim. App. Lexis 528 (Tenn. Crim. App. June 22, 2010) 15
Vann v. State, 229 P.3d 197 (Alaska Ct. App. 2010) 11, 15, 16

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

U.S. Const. amend. VI ..... *passim*
U.S. Const. amend. XIV 6
N.M. Stat. Ann. § 66-8-107 (Michie 2004) 1
Fed. R. Evid. 902 22
Sup. Ct. R. 10 5
Sup. Ct. R. 15.2 1

OTHER AUTHORITIES:

Black's Law Dictionary 1740 (9th ed. 2009) 18

STATEMENT OF THE CASE

Donald Bullcoming rear-ended Dennis (Randy) Jackson's truck while it was stopped at an intersection in Farmington, New Mexico, late in the afternoon of August 14, 2005. Pet. App. A at 7a. Mr. Jackson asked his wife to call the police when he saw that Mr. Bullcoming smelled of alcohol and had bloodshot eyes. *Id.* The arresting officer also testified Mr. Bullcoming had watery, bloodshot eyes, slurred speech, and smelled of alcohol. *Id.* In response to officer questioning, Mr. Bullcoming responded that he had a drink at 6:00 a.m. but had not been drinking since then. *Id.* The officer administered field sobriety tests, which Mr. Bullcoming failed. *Id.* The officer arrested Mr. Bullcoming for driving while intoxicated ("DWI").[1] *Id.*

Because Mr. Bullcoming refused to take a breath test, the arresting officer applied to a judge for a search warrant to perform a blood alcohol test. *Id.* New Mexico's Implied Consent Act requires that a test of blood or breath be administered when a law enforcement officer has reasonable grounds to believe a person has been driving a motor vehicle under the influence of intoxicating liquor or drugs. N.M. Stat. Ann. § 66-8-107(B) (Michie 2004).

After a search warrant was issued, the officer took Mr. Bullcoming to the local emergency room. Pet. App. B at 23a. A nurse extracted blood following the

[1] Pursuant to Supreme Court Rule 15.2, the State points out that the petition for certiorari, without citation, provides selective factual background information and does not include reference to all evidence presented at trial regarding the events leading to Mr. Bullcoming's arrest after the vehicular accident. With respect to the background information, the State relies on the facts of record at trial, as well as the recitation of facts appearing in the state appellate court opinions. See Pet. App. A and B.

instructions contained in a blood collection kit approved by the Scientific Laboratory Division, Toxicology Bureau, of the New Mexico Department of Health ("SLD"). Pet. App. D at 31a.

The arresting officer and the nurse filled out information on a Report of Blood Alcohol Analysis ("BAC report"), showing that Mr. Bullcoming was arrested at 5:00 p.m. on August 14, 2005, and that a specimen of his blood was drawn at 6:25 p.m. that day. Pet. App. D at 31a. The BAC report showed it was received at SLD on August 16, 2005, that the sample seal was received intact, and that the seal was broken in the laboratory on August 17, 2005. *Id.* The analyst certified that chemical analysis of the sample showed a concentration of alcohol in the sample of .21 grams per 100 milliliters of blood. *Id.*

On August 18, 2005, a reviewer certified that the analyst met the qualifications required by the director of the laboratory for conducting the analysis and that the established procedure was followed in the handling and analysis of the sample. *Id.* A laboratory employee certified that a copy of the BAC report was mailed to Mr. Bullcoming on August 22, 2005. *Id.*

At trial, both the nurse who drew Mr. Bullcoming's blood and the arresting officer who prepared a portion of the BAC report testified. Pet. App. A at 8a. The BAC report was admitted into evidence through the testimony of Gerasimos Razatos, an analyst at SLD involved in overseeing the breath and blood alcohol programs throughout New Mexico. *Id.* Mr. Bullcoming objected to the admission of the BAC report on the basis that it violated his right of confrontation because it was

prepared in anticipation of litigation. *Id.* The trial court admitted the BAC report as a business record and held admission of the report was not prohibited by *Crawford v. Washington*, 541 U.S. 36 (2004). Pet. App. A at 8a-9a.

Mr. Razatos did not perform the analysis of Mr. Bullcoming's blood specimen and was not involved in preparing the BAC report. *Id.* at 8a. The analyst who performed the test did not testify because he had recently been placed on unpaid leave. *Id.*

Mr. Razatos testified as an expert witness about Mr. Bullcoming's blood alcohol content and the standard procedures of the laboratory. *Id.* He testified that the instrument used to analyze Mr. Bullcoming's blood was a gas chromatograph machine and explained that the detectors within the gas chromatograph machine detect the compounds before the computer prints out the results. *Id.* When Mr. Razatos was asked by the prosecutor whether "any human being could look and write and just record the result," he answered, "Correct." *Id.* He also testified that the gas chromatograph machine prints out the result and then the result is transcribed on the BAC report. *Id.*

At the end of the trial, the jury returned a verdict of guilty of DWI. Pet. App. C at 28a. The trial court found this was "at least a fifth DWI conviction," and, pursuant to state law, denominated Mr. Bullcoming's crime a fourth-degree felony, sentencing him to two years of confinement and one year of parole. *Id.*

On appeal to the New Mexico Court of Appeals, Mr. Bullcoming argued that his Sixth Amendment right of confrontation had been violated by the admission of

the BAC report through the testimony of the forensic scientist who did not prepare the report. Pet. App. B at 25a; *State v. Bullcoming*, 189 P.3d 679 (N.M. Ct. App. 2009). The intermediate appellate court rejected the claim based on *State v. Dedman*, 102 P.3d 628 (N.M. 2004), which construed *Crawford* and held state laboratory reports were nontestimonial in nature, not unreliable or untrustworthy, and admissible under the public records exception to the hearsay rule. *Id.*

On discretionary review in the New Mexico Supreme Court, Mr. Bullcoming argued that the BAC report admitted in his case was testimonial as defined by *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). Pet. App. A at 6a; *State v. Bullcoming*, 226 P.3d 1 (N.M. 2010). Based on its reading of *Melendez-Diaz*, the New Mexico Supreme Court overruled its decision in *Dedman* and held that BAC reports must be considered testimonial. *Id.* at 10a. The court rejected the State's claim that an oath is required before a document may be considered sufficiently formal to qualify as the functional equivalent of live testimony. *Id.* at 10a-11a. The court nonetheless determined that the BAC report could be admitted through the live testimony of a qualified analyst because it merely transcribed results from a machine and, for Confrontation Clause purposes, the machine was the true accuser. *Id.* at 11a.

REASONS FOR DENYING THE WRIT

The issue in this case is, as Mr. Bullcoming contends, unquestionably important to the administration of criminal justice. Pet. at 19. Contrary to his assertion, however, the New Mexico Supreme Court has not decided this important

federal question in a way that conflicts with relevant decisions of this Court. See Sup. Ct. R. 10(c).

Applying the principles set forth in *Melendez-Diaz*, the New Mexico Supreme Court held that a BAC report was testimonial and that its admission into evidence did not violate the Confrontation Clause "because the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine, and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation." Pet. App. A at 6a. In a companion case issued the same day, the court, again applying *Melendez-Diaz*, clarified that a crime laboratory report in which a nontestifying analyst identifies a controlled substance may not be admitted through another analyst who does not present an independent expert opinion as to the nature of the substance. *State v. Aragon*, 225 P.3d 1280, 1290-91 (N.M. 2010). The New Mexico Supreme Court has resolved the Confrontation Clause challenge to the admissibility of state laboratory reports in a manner that is consonant with the guidance set forth in *Melendez-Diaz*.

Further, the New Mexico Supreme Court has not decided this important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. See Sup. Ct. R. 10(b). Rulings of other state courts and of federal courts support the New Mexico Supreme Court's treatment of raw data.

For these reasons, this Court should deny the petition for writ of certiorari. The only potential purpose for granting certiorari in this case would be to give this Court an opportunity to revisit and clarify its decisions in *Crawford*, *Melendez Diaz*, and *Davis v. Washington*, 547 U.S. 813 (2006).

I. THE NEW MEXICO SUPREME COURT CORRECTLY HELD THAT *MELENDEZ-DIAZ* DOES NOT APPLY TO THE INTRODUCTION OF RAW DATA RECORDED, WITHOUT INTERPRETATION, BY A NONTESTIFYING ANALYST.

1. The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. This Court has determined that the Sixth Amendment right of confrontation was incorporated into the Fourteenth Amendment, and is thus applicable to the States because it is essential to a fair trial. *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *see also Danforth v. Minnesota*, 552 U.S. 264, 269-70 (2008) (discussing incorporation and concluding that *Crawford* announced a new rule). For incorporation purposes, this Court has looked to the understanding in place at the time the Fourteenth Amendment was adopted in 1868. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038-42 (2010); *Malloy v. Hogan*, 378 U.S. 1, 4-5 (1964).

Protecting the confrontation rights of an accused through cross-examination of a witness consists "not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United*

States, 156 U.S. 237, 242-43 (1895). The Confrontation Clause is satisfied by "the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor," and "has long been read as securing an adequate opportunity to cross-examine adverse witnesses." *United States v. Owens*, 484 U.S. 554, 557, 560 (1988) (citing *California v. Green*, 399 U.S. 149, 158-61 (1970)). The "particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." *Green*, 399 U.S. at 156; *accord Crawford*, 541 U.S. at 50.

In *Crawford*, this Court determined that the Confrontation Clause forbids "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54. The Court departed from the approach approved in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which assessed whether an out-of-court statement had adequate indicia of reliability. Opposing this shift in Confrontation Clause interpretation, Chief Justice Rehnquist opined that *Crawford* stepped away from the view that "[e]xceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made." *Crawford*, 541 U.S. at 69, 74 (Rehnquist, C.J., concurring in the judgment).

In overruling *Roberts*, *Crawford* triggered a new exploration by lower courts into what out-of-court statements might be considered "testimonial." *Crawford*, and the meaning of "testimonial," has generated an enormous amount of lower-court examination.[2]

This Court provided additional guidance on the scope of the term "testimonial" in *Melendez-Diaz*. A majority of the Court held that affidavits of forensic analysis were testimonial statements that implicate the Confrontation Clause. 129 S. Ct. at 2532. Because the sworn documents entered into evidence in *Melendez-Diaz* were considered testimonial statements, the accused had the right to confront the analysts at trial. *Id.*

2. Here, the New Mexico Supreme Court followed the instruction of *Crawford* and *Melendez-Diaz*. It upheld the BAC report prepared by a nontestifying analyst acting as "a mere scrivener who simply transcribed the results generated by a gas chromatograph machine." Pet. App. A at 6a. Emphasizing the need for live, in-court testimony that allowed meaningful cross-examination regarding the substance of the BAC report, the court determined that the testimony of another qualified analyst was sufficient to satisfy Mr. Bullcoming's right of confrontation. *Id.* at 12a. Because Mr. Razatos was available for cross-examination and because the results of the gas chromatograph machine constitute facts or data of the type

[2] For a very rough indication of *Crawford*'s impact, a Shepard's analysis on August 13, 2010, shows that 8,168 cases have cited *Crawford*, well over double – in a six year span – the number of cases (3,095) that cited *Roberts* in the twenty four years before its overruling.

reasonably relied upon by experts in the field, the New Mexico Supreme Court rejected Mr. Bullcoming's confrontation claim. *Id.* at 12a-13a.

In reaching this conclusion, the New Mexico Supreme Court pointed to its simultaneously-issued holding in the companion case. In *Aragon*, the court held that an analyst could not simply present an out-of-court statement of another analyst that a substance was a specific narcotic and that it had a specific level of purity because those determinations required an expert conclusion. 225 P.3d at 1290-91. The testifying analyst in *Aragon* did not offer an independent opinion regarding the nature and purity level of the substance, so the views and report of the nontestifying analyst were therefore inadmissible under the Confrontation Clause. *Id.*

In the present case, the New Mexico Supreme Court contrasted the out-of-court expert opinion in *Aragon* with the raw data generated by the gas chromatograph machine admitted at Mr. Bullcoming's trial. Pet. App. A at 11a. The court emphasized the nontestimonial nature of the data derived from the gas chromatograph by urging that, in future cases, the State seek admission of the raw data produced by the gas chromatograph machine to supplement the live, in-court testimony of the forensic analyst and to assist the jury in ascertaining "the accuracy and reliability of the analyst's testimony regarding a defendant's BAC." Pet. App. A at 13a.

The court's holding properly construes and applies this Court's decision in *Melendez-Diaz*. Although it viewed the report as testimonial under *Melendez-Diaz*,

the court perceived the raw data reflected in the report as amounting to testimony from a machine that could not be examined as a witness. *See* Pet. App. A at 11a. The analyst who transcribed the data generated by the machine acted in a manner similar to a copyist in the early 1800s who certified the truth and accuracy of the copy. *See Melendez-Diaz*, 129 S. Ct. at 2553 (Kennedy, J., dissenting) (citing *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 85 (1833)). Introducing a report with transcribed raw data through the live testimony of a qualified expert did not violate Mr. Bullcoming's right of confrontation.

II. NO CONFLICT EXISTS AMONG FEDERAL CIRCUITS AND STATE COURTS OF LAST RESORT REGARDING THE ADMISSION OF A LABORATORY REPORT CONTAINING RAW DATA.

1. Mr. Bullcoming describes state high courts and federal courts of appeals as being "deeply and intractably divided over whether the Confrontation Clause . . . allows the government to introduce testimonial statements of a nontestifying forensic analyst" through the testimony of another analyst. Pet. at 7. A survey of federal and state authorities, however, reveals a strikingly coherent and uniform application of *Melendez-Diaz* to scientific reports and no conflict in cases like the present case involving the introduction of raw data generated by a machine.

The majority of cases cited by Mr. Bullcoming address the admission of scientific information requiring expert determinations and conclusions. Those cases, and similar later cases, address the introduction of evidence reflecting scientific findings and conclusions drawn by nontestifying analysts performing autopsies, DNA analysis, narcotics identification, and other complex analyses.

Unlike cases involving the introduction of simple raw data through an expert witness, the cases involving greater complexity in forensic analysis present more challenging confrontation issues.

Even in the more complex cases, there are only limited areas of conflict. Courts agree that an expert cannot serve as a mere conduit or transmitter of a nontestifying expert's opinions and conclusions; courts also agree, with one possible exception,[3] that an expert may testify at trial as to the expert's own independent opinions that rely on laboratory tests conducted by a nontestifying analyst or on other external factual findings. *See United States v. Turner*, 591 F.3d 928, 932-33 (7th Cir. 2010); Vann *v. State*, 229 P.3d 197, 203-211 (Alaska Ct. App. 2010); *State v. Snelling*, No. CR-08-0164-AP, 2010 Ariz. Lexis 38, at *9-11 (Ariz. Aug. 9, 2010); *Smith v. State*, 28 So. 3d 838, 855 & n.12 (Fla. 2010) (per curiam), ***petition for cert. filed***, No. 09-10755 (May 10, 2010); *Rector v. State*, 681 S.E.2d 157, 160 (Ga.), ***cert. denied***, 130 S. Ct. 807 (2009); *People v. Williams*, No. 107550, 2010 Ill. Lexis 971, at *30, 36 (Ill. July 15, 2010); *Pendergrass v. State*, 913 N.E.2d 703, 707-08 (Ind. 2009), *cert. denied*, 130 S. Ct. 3409 (June 14, 2010); *People v. Webster*, No. 287478, 2010 Mich. App. Lexis 1195, at *7-9 (Mich. Ct. App. June 29, 2010) (unpublished); *State v. Dilbon*, 160 N.H. 135, 149 (2010); *State v. Hough*, 690 S.E.2d 285, 290-91 (N.C. Ct. App. 2010); *State v. Estrada-Lopez*, 927 N.E.2d 1147, 1159-60 (Ohio Ct. App.), ***review granted***, 930 N.E.2d 331 (Ohio July 21, 2010). The New Mexico Supreme Court's analysis of narcotics identification fits squarely within the "mere conduit"

[3] *See Gardner v. United States*, No. 07-CF-573, 2010 D.C. App. Lexis 351, at *15-18 & n.11 (D.C. July 8, 2010) (reserving judgment on the point and declining to "disaggregate" a testifying expert's independent assessment from testimony about the content of DC's analyst reports).

approach uniformly adopted in the wake of *Melendez-Diaz*. *See Aragon*, 225 P.3d at 1290-91.

2. In his petition, Mr. Bullcoming does not address the fact that the "testimonial statement" appearing in the SLD laboratory report in his case came from a machine and consisted of transcribed raw data, a factor not at play in the majority of cases he cites. In the relevant cases decided so far, there is no conflict in addressing the admissibility of raw data; courts have held that its admission does not violate the Confrontation Clause.

Mr. Razatos, the SLD analyst who reviewed Mr. Bullcoming's blood alcohol analysis, testified and was cross-examined at trial. He explained the standard operating procedures used at SLD and described the function and internal processes of the gas chromatograph machine used by SLD to analyze blood samples and to detect the levels of compounds in a sample. He agreed that in order to use the gas chromatograph machine there is nothing a human has to do other than look at the machine and record the result. The machine prints out the result, and it is recorded on the BAC report. In this instance, the result of Mr. Bullcoming's blood alcohol test was .21 grams of alcohol per 100 milliliters of blood.

In stating the results generated by the gas chromatograph machine, Mr. Razatos did not look to or rely on an expert scientific conclusion of another. In other words, he was not a mere conduit of another's expert opinion. Instead, he simply communicated the transcribed raw data emitted by the machine. The raw data as to the level of alcohol in the blood specimen spoke for itself.

Mr. Bullcoming claims a confrontation right against a machine. The New Mexico Supreme Court rejected this claim because the report was admitted through the testimony of an analyst who was available for cross-examination. Pet. App. A at 11a-12a. As the New Mexico Supreme Court held, Mr. Bullcoming's "true 'accuser' was the gas chromatograph machine which detected the presence of alcohol in [Mr. Bullcoming's] blood, assessed [Mr. Bullcoming's] BAC, and generated a computer print-out listing its results." Pet. App. A at 11a.

The New Mexico court's interpretation of the Confrontation Clause as it applies to raw data is in accord with that of other jurisdictions. Prior to *Melendez-Diaz*, both the Fourth Circuit and the Seventh Circuit Courts of Appeals addressed the Confrontation Clause implications of raw data. In *United States v. Washington*, 498 F.3d 225, 229 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), the defendant challenged an expert's reliance on raw data obtained by lab technicians using machines to determine levels of alcohol and PCP in a blood sample the defendant gave after he was arrested for DWI. The Fourth Circuit held that the raw data generated by the diagnostic machines were not "statements" of the machines' operators, but rather of the machines themselves. *Id.* at 230. As a result, the Court concluded that the raw data from the machines were not out-of-court statements by declarants that are subject to the Confrontation Clause. *Id.*

In *United States v. Moon*, 512 F.3d 359, 361-62 (7th Cir.), *cert. denied*, 129 S. Ct. 39, *and cert. denied*, 129 S. Ct. 40 (2008), reports prepared by a nontestifying analyst were admitted without objection through the testimony of another analyst.

The reports contained both readings from instruments and the conclusion of the nontestifying analyst regarding the nature of the substance. *Id.* The Court addressed the defendants' challenge to the admission of the raw data as follows:

> A physician may order a blood test for a patient and infer from the levels of sugar and insulin that the patient has diabetes. The physician's diagnosis is testimonial, but the lab's raw results are not, because data are not "statements" in any useful sense. Nor is a machine a "witness against" anyone. If the readings are "statements" by a "witness against" the defendants, then the machine must be the declarant. Yet how could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests.

Id. at 362.

Other courts have followed the principles set forth in *Moon* and *Washington* not only in cases limited to the admission of raw data, but also in cases involving more complex forensic analysis. In *Smith*, the Florida Supreme Court adopted the reasoning of *Moon* and *Washington* and held that the Confrontation Clause does not require laboratory technicians who actually perform DNA tests to testify at trial when their supervisor testifies about the test results in conjunction with her interpretations and conclusions drawn from the data. 28 So. 3d at 855. A petition for writ of certiorari in that case is currently pending in this Court under Docket Number 09-10755.

Similarly, in *State v. Appleby*, 221 P.3d 525, 551-52 (Kan. 2009), the Kansas Supreme Court concluded that population frequency data relating to specific DNA profiles was nontestimonial and, therefore, did not require that the person who compiled the data be subject to cross-examination in order for it to be used by a

testifying DNA expert in presenting a testimonial opinion. Because the database and the statistical program are accepted sources of information generally relied on by DNA experts, they could be relied on by a testifying analyst in offering an expert opinion. *Id.*

And in *People v. Brown*, 918 N.E.2d 927, 931 (N.Y. 2009), the New York Court of Appeals concluded that a DNA report was nontestimonial "because it consisted of merely machine-generated graphs, charts and numerical data." A technician's "use of the typing machine" did not involve conclusions, interpretations, comparisons, or any form of subjective analysis. *Id.*

Trial and intermediate appellate courts have also had no difficulty concluding that the Confrontation Clause does not preclude the admission of raw data or machine print-outs even without the live testimony of the analyst involved in producing the machine results. *United States v. Darden*, 656 F. Supp. 2d 560, 563 (D. Md. 2009) ("printed data [concerning blood alcohol concentration] generated by testing machines"); *Vann*, 229 P.3d at 210 (DNA expert's independent analysis "of the printed test results produced by the machine"); *State v. Tindell*, No. E2008-02635-CCA-R3-CD, 2010 Tenn. Crim. App. Lexis 528, at * 38 (Tenn. Crim. App. June 22, 2010) ("[T]he intoximeter simply produced a print-out of its results. Neither that print-out nor the Intoximeter is a 'witness' within the meaning of the Confrontation Clause."); *Hamilton v. State*, 300 S.W.3d 14, 22 (Tex. App. 2009) ("The Confrontation Clause implicates statements made by persons, not machines.")

Courts are not divided on the subject of raw data. Its admission does not violate the Confrontation Clause. Mr. Bullcoming, therefore, cannot establish a conflict between the New Mexico Supreme Court's holding and decisions of other state high courts or federal circuit courts of appeal.

3. With respect to the types of cases relied upon by Mr. Bullcoming addressing forensic reports prepared with a higher level of professional judgment than raw data, courts generally agree that a testifying expert cannot communicate to the jury the opinion or conclusion of a nontestifying expert.[4] At the same time, however, courts have had more difficulty addressing the admissibility of a nontestifying expert's scientific findings and observations.

The majority of courts permit an expert to testify about the factual findings and observations of a nontestifying analyst in order to explain the basis for the testifying expert's opinion. *See Snelling*, 2010 Ariz. Lexis 38, at *9-10; *Rector*, 681 S.E.2d at 160; *Williams*, 2010 Ill. Lexis 971, at *30-31; *Pendergrass*, 913 N.E.2d at 704, 708; *Dilboy*, 160 N.H. at 150; *see also Lamm*, 229 P.3d at 207-08; *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-13 (Ct. App.), *review granted*, 220 P.3d 239 (Cal. 2009); *Estrada-Lopez*, 927 N.E.2d at 1159. Under the minority view, expert testimony regarding findings generated by another expert are prohibited on direct examination. *See Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009); *Marshall v. State*, 232 P.3d 467, 475 (Okla. Crim. App. 2010); *see also People v.*

[4] *But see Rector*, 681 S.E.2d at 160 (finding no error in the testifying expert's agreement with the conclusion of the nontestifying expert).

Dungo, 98 Cal. Rptr. 3d 702, 713-14 (Ct. App.), *review granted*, 220 P.3d 240 (Cal. 2009); *Martinez v. State*, 311 S.W.3d 104, 110-11 (Tex. App. 2010).[3]

Thus, a nascent conflict may well be emerging on the narrow question of whether scientific findings and observations underlying an expert's opinion may be admitted in cases involving complex scientific testing like that conducted in autopsies or drug identification. *See Dilboy*, 160 N.H. at 149-50 (describing the conflict). At this time, the conflict has not yet fully taken root in state courts of last resort or federal circuit courts of appeal.

Regardless of whether such a conflict is ripening, however, it is not applicable in this case. The BAC report admitted into evidence at Mr. Bullcoming's trial did not contain subjective findings or conclusions reached by a nontestifying examiner. It contained the type of raw data uniformly admitted by courts both before and after *Melendez-Diaz*.

III. THE DOCUMENT IN THIS CASE IS NOT TESTIMONIAL BECAUSE IT WAS NOT PREPARED UNDER OATH.

The foregoing analysis explains why the petition should be denied. If the petition were granted, however, the State would not limit its argument to the grounds relied upon by the New Mexico Supreme Court. The State would also advance the argument that the right of confrontation extends no further than the core class of testimonial statements comprised of affidavits, depositions, prior

[3] Although Mr. Bullcoming points to *State v. Locklear*, 681 S.E.2d 293, 304 (N.C., 2009), Pet. at 12, North Carolina has not resolved whether there is a distinction between the factual findings and the expert opinions of a nontestifying analyst. *See Hough*, 690 S.E.2d at 290-91 (interpreting *Locklear* as permitting testimony from a report about the weights of drugs and tests performed by another analyst).

testimony, testimony at trial, and police interrogations having the degree of formality associated with the inquisitorial examinations used in England in the 16th century. All other statements, including the unsworn statement in this case, would be better examined in constitutional terms under the framework of due process.

The BAC report is not—as the New Mexico Supreme Court found it to be—testimonial. *See* Pet. App. A at 11a. As an unsworn document containing raw data, its admission does not violate the Confrontation Clause.

I. The text of the Sixth Amendment applies the right of confrontation to "witnesses." By definition, a "witness" makes a testimonial statement by taking an oath. *Black's Law Dictionary* 1740 (9th ed. 2009).

There is no mistake or ambiguity in the Framers' choice of words. At common law, unsworn statements did not typically serve as "substantive evidence upon which a conviction could be based." *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring in the judgment). When offered as substantive evidence, "unsworn testimonial statements were treated no differently at common law than were nontestimonial statements." *Id.* at 71. "It is unlikely that the Framers intended the word 'witness' to be read so broadly" as to include statements lacking the formality of those at issue under the Marian bail and committal statutes of the 16th century. *Davis*, 547 U.S. at 836 (Thomas, J., concurring in the judgment in part and dissenting in part).

The Confrontation Clause serves a limited purpose within the Bill of Rights. It is not designed to assure what the Due Process Clause protects, "that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219,

236 (1941). Confrontation "is a procedural rather than a substantive guarantee." *Crawford*, 541 U.S. at 61; *accord White v. Illinois*, 502 U.S. 346, 358 (1992) ("The admissibility of hearsay statements raises concerns lying at the periphery of those at which the Confrontation Clause is designed to address."). By its terms, the Confrontation Clause applies to sworn statements and provides a right to cross-examine witnesses making those sworn statements against the accused.

In *Crawford*, this Court carved out a narrow exception to the oath requirement for formalized police interrogations. 541 U.S. at 52. However, this narrow exception was a direct product of the Sixth Amendment serving as the Framers' response to the historical abuses under the Marian statutes. Formalized police interrogations "bear a striking resemblance to examinations by justices of the peace in England." *Id.*

Davis, however, expanded the right of confrontation beyond this narrow exception. In *Davis*, this Court held that statements made during an ongoing domestic emergency were not testimonial, while a woman's statements to a police officer as "part of an investigation into possibly criminal past conduct" were, by contrast, testimonial. 547 U.S. at 826-830. The difference in the statements lay in whether "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822.[6]

Justice Thomas described the purpose-based definition of "testimonial" adopted in the majority opinion as "needlessly over-inclusive" and "unpredictable." *Davis*, 547 U.S. at 834, 838 (Thomas, J., concurring in the judgment in part and

[6] The meaning of the "primary purpose" test and the degree of subjectivity involved in its application is currently before the Court in *Michigan v. Bryant*, No. 09-150, scheduled for argument on October 5, 2010.

dissenting in part). He also observed that the *Davis* test is not grounded in the historical context of the Sixth Amendment's ratification. *Id.* at 835-38.

If, unmoored from historical bases, all out-of-court statements were viewed as "testimonial" based on the purpose for which they were made, then the term "testimonial" would extend far beyond the procedural interpretation of the Confrontation Clause adopted in *Crawford*. By focusing on such concepts as motive and purpose, the test from *Davis* could in effect become a weak substitute for the substantive reliability test of *Roberts*. *See Crawford*, 541 U.S. at 71 (Rehnquist, C.J., concurring in the judgment) ("[A]ny classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.").

After *Crawford*, however, "[r]eliability is more properly a due process concern." *White*, 502 U.S. at 363-64 (Thomas, J., concurring in part and concurring in the judgment). The question under the Confrontation Clause, as opposed to the due process question of fundamental fairness, is not the extent to which cross-examination would be beneficial or the overall reliability of an out-of-court statement based on a declarant's purpose, *see Melendez-Diaz*, 129 S. Ct. at 2537 n.6, but instead whether the declarant is acting as a "witness" and makes a statement that is "testimonial." *See Crawford*, 541 U.S. at 51. With the single exception of Marian-type examinations, a "witness" does not testify without taking an oath.

2. The majority opinion in *Melendez-Diaz* designated the certificates of analysis as testimonial because they were prepared under oath in the form of an affidavit and therefore fell "within the 'core class of testimonial statements.'" 129 S. Ct. at 2532. Writing for the majority, Justice Scalia's opinion also characterized the documents as testimonial because "the *sole purpose* of the affidavits" was to establish prima facie evidence against an accused. *Id.*

Justice Thomas, however, concurred on the limited ground that the affidavits fell within the core class of testimonial statements implicating the Confrontation Clause, citing the partial dissent in *Davis*. *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring). Justice Kennedy's dissenting opinion in *Melendez-Diaz* similarly took issue with the use of a purpose-based approach to the term "testimonial" in the context of laboratory reports. 129 S. Ct. at 2552 (rejecting the proposition "that anyone who makes a formal statement for the purpose of later prosecution – no matter how removed from the crime – must be considered a 'witness against' the defendant"). As a result, it appears that five Justices in *Melendez-Diaz* did not agree with application of *Davis*'s purpose-based definition of testimonial to laboratory reports. *See Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (observing that the Court's holdings are defined by "that position taken by those Members who concurred in the judgments on the narrowest grounds"); *see also Dilboy*, 160 N.H. at 151 ("Justice Thomas's concurring opinion . . . underscores the limited reach of *Melendez-Diaz*.").

Nevertheless, the New Mexico Supreme Court determined that the BAC report was testimonial, despite the absence of an oath and despite being comprised of nontestimonial raw data, because it was "made 'for the purpose of establishing or proving some fact.'" Pet. App. A at 11a (quoting *Melendez-Diaz*, 129 S. Ct. at 2532); *see Aragon*, 225 P.3d at 1285 (expressly relying on *Davis*). Courts in other jurisdictions have also continued to apply the *Davis* purpose-based definition of "testimonial" to scientific reports. *Compare, e.g., Avila*, 912 N.E.2d at 1029 n.20 (concluding an autopsy report was testimonial because a reasonable person in the medical examiner's position would anticipate its use in a criminal prosecution), *and Marshall*, 232 P.3d at 475 (similar), *with State v. Lui*, 221 P.3d 948, 956 n.14 (Wash. Ct. App. 2009) (assuming a lab report to be testimonial but observing, with respect to purpose-based definition of testimonial, that "it is not clear that a majority of the Court supports this broad definition"), *review granted*, 228 P.3d 17 (Wash. 2010).

3. The BAC report is not a sworn document. Pet. App. D at 31a. Although it contains a signed certification by a number of individuals, this certification is no different from other self-authenticating public records. *See* Fed. R. Evid. 902(4) (applying to "data compilations in any form"). Unless virtually all public records are

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Avila and *Marshall*, the two state supreme court cases in the minority of the burgeoning conflict described above, addressed autopsy reports. In *Melendez-Diaz*, this Court mentioned *Crawford*'s discussion of coroner's reports. 129 S. Ct. at 2538. However, this discussion in *Crawford* focused on "statements taken by a coroner," *Crawford*, 541 U.S. at 47 n.2, and the common law practice of taking "sworn statements of witnesses before coroners," *id.* at 73 (Rehnquist, C.J., concurring in the judgment), rather than on the medical examiner's findings and conclusions. *See Giles v. California*, 128 S. Ct. 2678, 2701 (2008) (Breyer, J., dissenting) (describing "a Marian deposition" as "a deposition taken by a coroner or magistrate"). As recently noted by one state supreme court, "in light of Justice Thomas's concurrence in *Melendez-Diaz*, it appears unlikely that the majority of the Supreme Court intended to include autopsy information underlying expert testimony in the same category" as the evidence in *Melendez-Diaz*. *State v. Mitchell*, 2010 ME 73, 9 A.3d 1, 2010 Me. LEXIS 76 (Aug. 5, 2010).

to be considered testimonial, the certification in the BAC report does not supply the requisite level of solemnity to be a formalized testimonial statement. *See Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring in the judgment) (stating that the application of the Confrontation Clause to official records "would require numerous additional witnesses without any apparent gain in the truth-seeking process").

Because the BAC report was not sworn under oath and is not the product of a Marian-type examination, it should not be considered testimonial under *Melendez-Diaz*, regardless of the purpose for which it was made. The preparer of the document did not function as a "witness" within the meaning of the Sixth Amendment.

The requirement of an oath provides the bright-line certainty needed in the country's application of *Crawford* and serves to protect the right of confrontation as it was understood by the Framers. Beyond the core group of testimonial statements described in *Crawford*, the States must have some flexibility in assuring the reliability of out-of-court statements admitted at trial. *See Pointer*, 380 U.S. at 409 (Harlan, J., concurring in the result) (suggesting that the "Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness implicit in the concept of ordered liberty"); *see also Medina v. California*, 505 U.S. 437, 445 (1992) (recognizing that "the States have considerable expertise in matters of criminal procedure").

This Court has said, "The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be

preserved to the accused." *Mattox*, 156 U.S. at 243. General rules requiring the opportunity to cross-examine an adverse witness at trial, "however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Id.*

In this case, the New Mexico Supreme Court correctly held that the Confrontation Clause did not prohibit the admission of the BAC report because it contained raw data. This ruling was also correct because the document was not prepared under oath.

CONCLUSION

The petition for writ of certiorari should be denied, or the petition should be granted to reconsider the meaning of the word "witnesses" in the Sixth Amendment.

Respectfully submitted,

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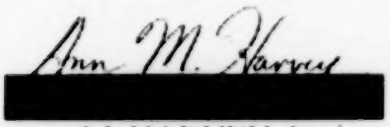

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REPLY BRIEF

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IN THE

Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Petition for a Writ of Certiorari
to the New Mexico Supreme Court

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

REPLY BRIEF FOR PETITIONER.....1

CONCLUSION.....11

TABLE OF AUTHORITIES

Federal Cases

Crawford v. Washington, 541 U.S. 36 (2004) 8,9,10,11

Davis v. Washington, 547 U.S. 813 (2006) 10

Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S. Ct. 2527, 2553 (2009) ..... *passim*

United States v. Washington, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009) 8, 9

State Cases

State v. Appleby, 221 P.3d 525 (Kan. 2009) 7,8,9

State v. Brewington, 693 S.E.2d 182 (N.C. App. 2010) 4,5,6

State v. Locklear, 363 N.C. 438, 681 S.E.2d 293 (2009) 5

Other Authority

2 P. Giannelli & E. Imwinkelried, Scientific Evidence § 23.03 (4th ed.2007) 6

REPLY BRIEF FOR PETITIONER

The State's brief in opposition agrees with the New Mexico Supreme Court's view that when a forensic analyst writes down the read-out from a machine in order to create evidence for a criminal prosecution, that analyst need not be confronted because his or her report does not contain subjective findings or conclusions. The State disagrees with the New Mexico Supreme Court's characterization of the blood alcohol report at issue as "testimonial," and argues that the admission of the report through a surrogate analyst is correct because the report is nontestimonial for two reasons: it contains only raw data, and it was not prepared under oath. The State's arguments, just like the New Mexico Supreme Court's reasoning, conflict squarely with this Court's precedent. This Court should grant certiorari and reverse.

1. The State's primary argument is: where an analyst is viewing raw data from a machine and transferring the results to a report, that analyst need not be cross-examined and a surrogate analyst will suffice to testify about the results. According to the State, a surrogate analyst who has no involvement in the specific test could testify because the analyst who prepared the blood alcohol report was a mere scrivener and Petitioner's true accuser was the gas chromatograph machine, which detected the presence of alcohol in Petitioner's blood, accessed Petitioner's BAC level, and generated a computer print-out listing its results. The State is not

troubled by the surrogate analyst testifying in this case, where the evidence indicates that the surrogate had not spoken with the actual analyst about the test, observed the actual analysis, or interpreted or reviewed the analysis or the raw data computer print-out from the machine. The surrogate analyst was qualified to testify, according to the State, because he had knowledge about the general operation of the gas chromatograph machine, the laboratory's standard procedures in conducting blood alcohol analyses, and the final results that were written on the forensic blood alcohol report.[1] (BIO 8-13).

A. The State argues that there is no need to confront the actual forensic analyst by equating him to a mere scrivener. The State, citing the *dissent* from *Melendez-Diaz*, argues that a person who authors a blood report analysis is akin to "a copyist in the early 1800s who certified the truth and accuracy of the copy." BIO 10 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527, 2553 (2009) (Kennedy, J., dissenting). But the majority rejected the dissent's argument, in terms squarely applicable here. Such clerks, the majority explained, "had no authority to furnish, as evidence for the trial of a lawsuit, [their] interpretation of what the record contains or shows, or to certify to its substance or

[1] Although the New Mexico Supreme Court states in its Opinion that the surrogate analyst was "qualified as an expert witness," he was not formally tendered by the State as an expert witness nor was he qualified as an "expert" by the trial court. *See* Pet. App. A at 11A.

effect." 129 S. Ct. at 2539. The majority continued to explain, "A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." *Id.* The majority's reasoning controls in this case.

Moreover, the actual analyst in this case was more than a mere scrivener. His role involved using scientific testing techniques, as well as reading the results from the gas chromatograph machine. The trial court testimony of the surrogate analyst explained that the actual analyst must open an original vial of blood and remove a small amount ("two aliquots") or two hundred micro-liters and place it in another vial with an "internal standard." The small sample of blood is capped in the new vial with a Teflon septum and then it is crimped with an aluminum top. Then, the glass vial is placed into a head space chromatograph with an auto sampler, which is about the size of a microwave. This machine detects which compounds are in the blood and a computer notifies the analyst of the substance and amount by recording information on a print-out, which the analyst reads.

Then the analyst records that information onto the blood alcohol report. In addition, the actual analyst certifies in the blood alcohol report chain of custody information such as "the seal of the sample was received intact and broken in the laboratory." Pet. App. D at 31A. The actual analyst also certifies in the report that

he or she followed the procedures set out on the reverse side of the report. Pet. App. D at 31A-32A. Then a reviewer (in this case, not the testifying surrogate analyst) certifies that the analysis was done according to procedures and that the analyst was qualified to conduct the analysis. Pet. App. D at 31A-32A.

B. The State (and the New Mexico Supreme Court) mistakenly portray the nontestifying forensic analyst in this case as a person who needs no scientific background and no special skills to analyze blood. After asserting that this person does not have to think or interpret anything, the State insists that it is appropriate to place a surrogate on the witness stand to repeat the analyst's testimonial statements—even though the surrogate had no personal knowledge of Petitioner's forensic test and played no role in the actual analysis and no role in reviewing the actual analysis. The State embraces the fact that Mr. Razatos, the surrogate analyst, testified that he agreed with the actual analyst's results; however, the record shows that he had no knowledge of the actual analyst's actions during the testing process, nor did he perform an independent analysis or review, or view the underlying data or notes. (BIO 8-10).

In *State v. Brewington*, 693 S.E.2d 182 (N.C. App. 2010), the prosecution, just as here, introduced one analyst's report through the testimony of another who was able to testify regarding general lab procedures but who did not herself assess the physical evidence or conduct any testing on it. *Id.* at 184, 190; *compare* Pet. App. A

at 11A-12A (Mr. Razatos, the surrogate analyst, testified regarding general procedures followed at the laboratory, the operation of the gas chromatograph machine but did not have any knowledge regarding the actual steps taken here).

The prosecution argued in *Brewington* that the surrogate testimony did not violate the Confrontation Clause because the testifying analyst reviewed the testing procedures that are typically adhered to at the lab, and reviewed the underlying notes and data of the actual analyst and the results of the examinations. *Brewington*, 693 S.E.2d at 184,190. The court rejected the surrogate's testimony as admissible "peer review" and found:

> It is clear from the testimony of [the testifying analyst] that she had no part in conducting any testing of the substance, nor did she conduct any independent analysis of *the substance*. She merely reviewed the reported findings of [the nontestifying analyst], and testified that if [that analyst] followed procedures, and if [that analyst] did not make any mistakes, and if [that analyst] did not deliberately falsify or alter the findings, then [the testifying analyst] "would have come to the same conclusion that she did." As the Supreme Court clearly established in *Melendez-Diaz*, it is precisely these "ifs" that need to be explored upon cross-examination to test the reliability of the evidence.

Id. at 190. The Court in *Brewington* concluded that under *Melendez-Diaz* and *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009), the surrogate's testimony was admitted in violation of defendant's right under the Confrontation Clause of the Sixth Amendment. *Id.*

This case, unlike *Brewington*, is a *pure* surrogate witness case. The surrogate analyst here not only had no involvement in the blood alcohol analysis, he did not review the underlying raw data or notes, or interpret or analyze the results himself. He simply explained how the test should have been performed, and read the actual analyst's results from the blood alcohol report into the record and assumed the results were correct.

C. The State argues that the New Mexico Supreme Courts' holding does not conflict with other federal appellate and state supreme courts' decisions because those decisions involved forensic "findings," "determinations," or "conclusions," instead of mere recitations of machine-generated data. BIO 10-17. But nothing about testimonial statements allegedly transcribing machine-generated data and certifying chain-of-custody information distinguishes them from other testimonial forensic statements.

Like it or not, lab analysts can (and occasionally do) falsify or simply *mistakenly record* lab data.[2] Accordingly, as this Court explained in *Melendez-Diaz*, the Clause guarantees an opportunity to test the "honesty" and care of the

[2] Lab analysts record data from machines that print-out data during drug analysis. *See* 2 P. Giannelli & E. Imwinkelried, Scientific Evidence § 23.03 (4th ed 2007) (describing common methods of identifying drugs, including infrared spectrophotometry, nuclear magnetic resonance, gas chromatography, and mass spectrometry).

actual author of a forensic report that the prosecution seeks to introduce into evidence. 129 S. Ct. at 2538. Indeed, an analyst "who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis." *Id.* at 2537 (citations omitted). Thus, *Melendez-Diaz* confirmed that in the context of forensic evidence, as everywhere else, "[a] witness's testimony against a defendant is" always "inadmissible unless *the witness* appears at trial or, if *the witness* is unavailable, the defendant had a prior opportunity for cross-examination." 129 S. Ct. at 2531 (emphasis added); *see also id.* at 2532 ("petitioner was entitled to 'be confronted with' *the analysts* at trial") (emphasis added); *id.* at 2537 n.6 ("The analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation . . . .") (emphasis added). Even the dissent recognized as much, acknowledging under the Court's holding that an analyst who writes a statement that is introduced into evidence must testify at trial: "The Court implies that only those statements that are actually entered into evidence require confrontation." 129 S. Ct. at 2545 (Kennedy, J., dissenting).

2. The State argues that a blood alcohol report that contains information from the gas chromatograph machine is "raw data." BIO 10-12,17. The State misunderstands the concept of raw data. Machine-generated readings or printouts are raw data because they contain no human assertions. *See, e.g., State v. Appleby*,

221 P.3d 525, 548-49 (Kan. 2009); *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009).

But once someone, as here, writes a blood alcohol report that recites what the machine supposedly says, that is a testimonial statement. Courts do *not* distinguish among instances of surrogate testimony according to the level of subjectivity in the reports at issue. (BIO 10-11). There is not a category of witnesses, helpful to the prosecution, but somehow immune from confrontation on the basis of the supposed objectivity of their assertions. Were it otherwise, the prosecution could use surrogate witnesses to introduce testimonial statements that recorded the time on a clock when shots rang out or that transcribed the numbers on a license plate of a getaway car. These assertions are just as "objective" as any assertion in a forensic report might be.

But if there is one thing that *Crawford* and *Melendez-Diaz* make clear, it is that courts may no longer deem the Confrontation Clause satisfied merely because they believe a particular statement is so objective or otherwise "obviously reliable" that cross-examining the witness who made it is unnecessary. *Crawford v. Washington*, 541 U.S. 36, 62 (2004); *Melendez-Diaz*, 129 S. Ct. at 2536.

To the extent the State suggests by its citation to cases like *State v. Appleby*, 221 P.3d 525 (Kan. 2009), that the forensic report in this case is nontestimonial, this is not so. (BIO, 14-15). The fact that the blood alcohol report here recites

objectively discernible data, does not make it nontestimonial. This Court made clear in *Melendez-Diaz* that forensic reports cannot be deemed nontestimonial on the ground that they supposedly reflect "neutral, scientific testing." 129 S. Ct. at 2536.

To be sure, the court in *Appleby* held that the forensic documents at issue there were non-testimonial. 221 P.3d at 551. But those documents were machine-generated printouts containing no human assertions. *Id.* at 548-49. The documents, therefore, constituted genuine "raw data," which does not implicate the Confrontation Clause or the question presented here. *See United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009).

Here, by contrast, the State did not try to introduce a computer printout from the gas chromatograph machine. Instead, the State introduced the nontestifying analyst's written assertions describing the evidence he tested, the procedures he followed, and the results he observed. *See* Pet. App. D at 31A-32A. Much as the State attempts to imply otherwise, those assertions are *not* "raw data." They are testimonial statements.

3. The State also argues that "the document in this case was not testimonial because it was not prepared under oath." BIO 17-24. But *Crawford* squarely rejected that argument, holding that "the absence of oath [i]s not dispositive." 541 U.S. at 52. "We find it implausible that a provision which concededly condemned

trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK." *Id* at 52 n.3. Eight Justices reaffirmed this holding in *Davis v. Washington*, 547 U.S. 813 (2006), holding that "we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it." *Id* at 826.

Just like the certificates of analysis in *Melendez-Diaz* that were deemed testimonial, the blood alcohol report in Petitioner's case is testimonial because it has a certification by the actual analyst and an attestation clause by the analyst's reviewer. Most importantly, the report is testimonial because it is a formal assertion designed to prove facts essential to the prosecution that would otherwise have to be proved by live, in court testimony.

4. That leaves the New Mexico Supreme Court's holding that the prosecution may put a surrogate on the stand to repeat someone else's testimonial statements when those statements supposedly transcribe forensic data. This reasoning flies in the face of *Crawford*'s basic rule that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant. *Id* at 54, 68. Indeed, this Court

has repeatedly held that the government violates the Confrontation Clause if it introduces a witness's testimonial statements through the in-court testimony of a different person, such as a police officer. *See id*; *Melendez-Diaz*, 129 S. Ct. at 2532; *id* at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . .").

CONCLUSION

There is no way to defend the result that the New Mexico Supreme Court reached in this case. Nor is there any logical way to distinguish it from other federal appellate and state supreme court decisions prohibiting surrogate forensic testimony under *Crawford* and *Melendez-Diaz*. The State's arguments are so in conflict with this Court's precedent that it may wish to consider summary reversal. But whatever the method, this Court should grant certiorari and reverse, so as to preserve and enforce the integrity of its decisions.

Respectfully submitted,

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No. 09-10876

In the

SUPREME COURT OF THE UNITED STATES

DONALD BULLCOMING,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

On Petition for a Writ of Certiorari
to the New Mexico Supreme Court

ON PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Susan Roth, a member of the Bar of this Court, hereby certify that on the 31st day of August, 2010, one copy Petitioner's Reply Brief in the above-entitled case were mailed, first-class postage prepaid, to Ann Harvey, Esq., Assistant Attorney General, Attorney General's Office, PO Drawer 1508, Santa Fe, NM, 87504-1508, counsel for Respondent, State of New Mexico. I further certify that she is the only party required to be served, and that she has been served.

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JOINT APPENDIX

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IN THE

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DONALD BULLCOMING,
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Respondent.

On Writ of Certiorari to the Supreme Court of New Mexico

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TABLE OF CONTENTS

	Page
Opinion of the Supreme Court of New Mexico	1
Opinion of the Court of Appeals of New Mexico	28
Jury Trial Transcript of Proceedings November 16, 2005	43
Report of Blood Alcohol Analysis	62

SUPREME COURT OF NEW MEXICO.

No. 31,186.

STATE OF NEW MEXICO,
Plaintiff-Respondent,

v.

DONALD BULLCOMING,
Defendant-Petitioner.

Feb. 12, 2010.

OPINION

MAES, Justice.

(1) Defendant, Donald Bullcoming, appeals his conviction of aggravated DWI, a fourth-degree felony, contrary to NMSA 1978, Section 66-8-102 (2005, prior to amendments through 2008). Of the three issues that Defendant raises, the main question presented in this appeal is whether a laboratory report of Defendant's blood draw results is testimonial evidence subject to the Confrontation Clause. We first addressed this issue in *State v. Dedman*, 2004-NMSC-037, ¶¶ 30, 45-46, 136 N.M. 561, 102 P.3d 628, and followed the United States Supreme Court case in *Crawford v. Washington*, 541 U.S. 36 (2004), to hold that (1) blood alcohol reports are public records and (2) they are non-testimonial under *Crawford* because public records are not "investigative or prosecutorial" in nature. We reverse our holding in *Dedman* in light of the recent United States Supreme

Court case of *Melendez-Diaz v. Massachusetts*, which held that the certificates reporting the results of forensic analysis were "quite plainly affidavits" and thus "there [was] little doubt that [they] fall within the 'core class of testimonial statements,'" governed by the Confrontation Clause. 129 S. Ct. 2527, 2532 (2009) (5-4 decision) (quoting *Crawford*, 541 U.S. at 51). Although the blood alcohol report was testimonial, we conclude that its admission did not violate the Confrontation Clause, because the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation.

{2} As to Defendant's other two issues, we hold that while Officer Snowbarger was never formally accepted as an expert witness, the parties understood he was being treated as an expert witness, and could give his opinion regarding the cause of the accident without witnessing it. We further hold that although the trial court erred in admitting Defendant's brother's (Brother) out-of-court hearsay statements, we find this error to be harmless because of the overwhelming evidence against Defendant. We affirm Defendant's convictions.

I. FACTS AND PROCEDURAL HISTORY

{3} We begin with a summary of the facts that the jury reasonably could have found at Defendant's trial. The facts will be further developed in the discussion of the issues. Defendant's vehicle rear-ended Dennis (Randy) Jackson's vehicle while stopped at the intersection of 30th Street and Farmington Avenue in Farmington, New Mexico. Mr. Jackson exited his vehicle to exchange insurance information with De-

fendant. Mr. Jackson noticed the smell of alcohol on Defendant's breath and his bloodshot eyes, and instructed his wife to call police. When Defendant was informed that police were on their way, Defendant excused himself to the restroom.

[4] Officer Marty Snowbarger of the Farmington Police Department responded to the call, learned that Defendant had left the accident scene, and went to find him. Officer Snowbarger drove his motorcycle in the direction where Defendant was seen walking. He first encountered and questioned Brother, who had been a passenger in the vehicle and also had left the accident scene. Brother explained to Officer Snowbarger that Defendant was the driver of the vehicle at the time of the accident, and pointed east to indicate the direction that Defendant had fled. Soon thereafter, Officer Snowbarger spotted Defendant crossing a nearby bridge at a quick pace and followed him behind a building that was east of the bridge. Officer Snowbarger noticed that Defendant exhibited signs of intoxication such as watery, bloodshot eyes, slurred speech, and smelled the odor of alcohol coming from Defendant. Defendant was taken back to the accident scene in a patrol vehicle. Officer David Rock, who had recently arrived to the accident scene, noticed that Defendant swayed while walking toward the sidewalk. Officer Rock noticed Defendant's bloodshot eyes and the odor of alcohol coming from Defendant's breath and then asked Defendant if he had been drinking that day. Defendant responded that he had a drink at 6:00 a.m., but had not been drinking since then. The Defendant performed a series of field sobriety tests, which he failed. Defendant was arrested for DWI and transported to the Farmington police station for booking. Because Defendant refused to take a breath test, Officer Rock

obtained a search warrant to perform a blood alcohol test. Defendant had a blood alcohol content (BAC) of 0.21gms/100ml, well over the legal limit of 0.08gms/100ml. Defendant was convicted by jury of DWI and sentenced to a prison term of two years.

{5} Defendant appealed to the Court of Appeals raising five issues:

> (1) that the district court erred in denying a motion for mistrial based on the prosecutor's improper comment on silence in closing argument, (2) that the district court abused its discretion by allowing testimony by a police officer about the cause of an accident involving Defendant when the officer did not witness the accident, (3) that the district court erred in admitting into evidence blood draw results when the analyst who prepared the results was not available to testify, (4) that the district court erred in admitting into evidence the hearsay statement of Defendant's brother, and (5) that the State did not sufficiently prove Defendant's four prior DWI convictions.

State v. Bullcoming, 2008-NMCA-097, ¶ 1, 144 N.M. 546, 189 P.3d 679. The Court of Appeals determined that (1) the prosecutor was commenting on Defendant's pre-arrest silence, which is permissible for impeachment purposes, *id.* ¶ 7; (2) the officer was properly qualified as an expert witness and could provide his opinion about the cause of the accident, *id.* ¶ 11; (3) the blood alcohol report was non-testimonial, and thus its admission did not violate the Confrontation Clause, *id.* ¶ 17; (4) Brother's statements were not hearsay because they were not

offered for the truth of the matter asserted and their admission did not prejudice Defendant, *id.* ¶ 19; and (5) that there was sufficient evidence to prove Defendant's prior convictions, *id.* ¶ 27. The Court of Appeals concluded that Defendant's claims were without merit and affirmed his conviction. *Id.* ¶¶ 1, 28. Defendant's petition for certiorari raised five issues. We granted certiorari to consider the following three issues: (1) whether the trial court abused its discretion by allowing Officer Snowbarger to testify regarding the cause of Defendant's accident; (2) whether the trial court erred in admitting the blood draw results as a business record, over defense counsel's confrontation objection, when the analyst who prepared the results was not available to testify; and (3) whether the trial court erred in admitting, over defense counsel's objection, hearsay testimony through Officer Snowbarger of an eyewitness, Brother, who did not testify at trial.

II. DISCUSSION

A. Whether the Trial Court Erred in Admitting the Blood Draw Results as a Business Record, Over Defense Counsel's Confrontation Objection, When the Analyst Who Prepared the Results Was Not Available to Testify

{6} At trial, the State presented the Report of Blood Alcohol Analysis of Defendant's blood through Gerasimos Razatos, an analyst for the New Mexico Department of Health, Scientific Laboratory Division, Toxicology Bureau (SLD), who helps in overseeing the breath and blood alcohol programs throughout the state. The report is a two-page document and was admitted into evidence as Exhibit 1. It is attached to this opinion for reference. The first page is composed

of Part A and Part B. Part A contains chain of custody information, specifically identifying the arresting officer, the donor, the person who drew the donor's blood, and the date, time, and place of the blood draw. Part A also specifies the information sought by the officer and the location where the results are to be sent.

[7] Part B has four parts that primarily provide chain of custody information. The receiving employee signs the first section of Part B, certifying the type of specimen that was received, how it was received, whether the seal was intact, and that the employee complied with the procedures delineated in paragraph two of the second page of Exhibit 1. The analyst signs the second section of Part B, certifying that the seal of the sample was received intact and was broken in the laboratory, that the analyst followed the procedures in paragraph number three on the second page of Exhibit 1, and that the test results were recorded by the analyst. A reviewer signs the third section of Part B, certifying that the analyst and the analyst's supervisor are qualified to conduct the analysis and that the established procedures had been followed. Finally, a laboratory employee signs the fourth section of Part B, certifying that a legible copy of the report had been mailed to the donor. Finally, the second page of Exhibit 1 identifies the method used for testing the blood sample and details the procedures that must be followed by laboratory personnel.

[8] The analyst who prepared Exhibit 1 did not testify at Defendant's trial because he "was very recently put on unpaid leave." However, Razatos, who had no involvement in preparing Exhibit 1, testified about Defendant's BAC and the standard procedures

of the laboratory. He testified that the instrument used to analyze Defendant's blood was a gas chromatograph machine. The detectors within the gas chromatograph machine detect the compounds and the computer prints out the results. When Razatos wasasked by the prosecutor whether "any human being could look and write and just record the result," he answered, "Correct." On cross-examination he also testified that this particular machine prints out the result and then it is transcribed to Exhibit 1. Both the nurse who drew the blood and the officer who observed the blood draw and who also prepared and sent the blood kit to SLD, testified at trial and were available for cross-examination.

{9} Defendant objected to the admission of Exhibit 1 because the analyst who performed the test was not at trial to testify, which he argued would violate Defendant's constitutional right to confrontation. He also argued that, because Exhibit 1 was prepared in anticipation of trial, it did not qualify as a business record. The trial court admitted Exhibit 1 as a business record exception to the rule against hearsay. Rule 11-803(F), (H) NMRA. The trial court also held that the admission of Exhibit 1 was not prohibited by *Crawford*. Exhibit 1 was shown to the jury.

{10} Whether Exhibit 1 was admitted in violation of the Confrontation Clause of the United States Constitution is a question of law which we review de novo. *State v. Rivera*, 2008-NMSC-056, ¶ 10, 144 N.M. 836, 192 P.3d 1213.

{11} The United States Supreme Court in *Crawford* held that the Confrontation Clause prohibits the admission of "testimonial statements" unless the declarant is unavailable to testify, "and the defen-

dant had had a prior opportunity for cross-examination." 541 U.S. at 53-54. Though the Court declined to definitively state what constitutes a "testimonial" statement, it described the various formulations of the core class of testimonial statements covered by the Confrontation Clause. *Id.* at 51-52.

{12} In *Dedman*, we followed *Crawford* to hold that (1) blood alcohol reports prepared by SLD are public records, and (2) they are non-testimonial under *Crawford* because public records are not "investigative or prosecutorial" in nature. *Dedman*, 2004-NMSC-037, ¶¶ 30, 45-46. We first determined that the reports were admissible because they fell within the hearsay exception for "public records" since they "follow a routine manner of preparation that guarantees a certain level of comfort as to their trustworthiness." *Id.* ¶ 24. Second, though we recognized that the "right of confrontation requires an independent inquiry that is not satisfied by a determination that evidence is admissible under a hearsay exception," we essentially held that blood alcohol reports were not subject to the Confrontation Clause for the same reasons that we considered them to be public records. *Id.* ¶ 25. We determined that the main concern of the Confrontation Clause was the "'[i]nvolvement of government officers in the production of testimony with an eye toward trial,' because this provide[d] a 'unique potential for prosecutorial abuse.'" *Id.* ¶ 29 (quoting *Crawford*, 541 U.S. at 56 n. 7). Since blood alcohol reports are not prepared by law enforcement personnel and are neither investigative nor prosecutorial, they do not present the same potential for abuse. *Id.* ¶¶ 29-30. Thus, we concluded that the blood alcohol tests in question were non-testimonial because, as public records, their preparation was "routine, non-

adversarial, and made to ensure an accurate measurement." *Id.* ¶ 30.

{13} While this appeal was pending, the United States Supreme Court in *Melendez-Diaz* considered whether a certificate prepared by a forensic laboratory analyst fell within the core class of testimonial statements identified in *Crawford*. *Melendez-Diaz*, 129 S. Ct. at 2532. The plurality held that the certificates, which reported the results of forensic analysis showing that the substance found in seized bags was cocaine of a certain weight, were "quite plainly affidavits" and thus "[t]here [was] little doubt that [they] fall within the 'core class of testimonial statements,'" governed by the Confrontation Clause. *Id.* Justice Scalia delivered the opinion of the Court in which Justices Stevens, Souter, Thomas and Ginsburg joined. Justice Thomas filed a concurring opinion adhering to his position in *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment), that "[t]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) (internal quotation marks and citation omitted). Because the certificates in question were "quite plainly affidavits," Justice Thomas agreed with the majority that they fall within the core class of testimonial statements. *Id.*

{14} The other four Justices that joined Justice Thomas to form the plurality went further, stating that the certificates were testimonial because they were "'made under circumstances which would lead an objective witness reasonably to believe that the

statement would be available for use at a later trial,'" *id.* at 2531 (quoting *Crawford*, 541 U.S. at 52), and were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,'" *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)). They reasoned that the Sixth Amendment only contemplated "two classes of witnesses—those against the defendant and those in his favor" and that "there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 2534. Forensic evidence is neither immune from manipulation nor inherently "neutral." *Id.* at 2536.

{15} On the other hand, the dissent authored by Justice Kennedy distinguishes between "conventional witness[es]," which he defines as those "who [have] personal knowledge of some aspect of the defendant's guilt," and laboratory analysts who perform tests. *Id.* at 2543 (Kennedy, J., dissenting). Kennedy also focused on the policy implications of requiring laboratory analysts to testify, and argued that *Melendez-Diaz* "threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician . . . simply does not or cannot appear." *Id.* at 2549.

{16} *Melendez-Diaz* throws into doubt our assessment in *Dedman* that blood alcohol reports as public records are inherently immune from governmental abuse. First, *Melendez-Diaz* clarified that "analysts' certificates—like police reports generated by law enforcement officials—do not qualify as business or public records" because they are "calculated for use

essentially in the court, not in the business." *Id.* at 2538 (internal quotation marks and citation omitted). Though "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status, . . . that is not the case if the regularly conducted business activity is the production of evidence for use at trial." *Id.* Second, *Melendez-Diaz* made clear that the same concerns of governmental abuse which exist in the production of evidence by law enforcement exist in the production of forensic evidence. The Court noted that "[a] forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." *Id.* at 2536. For these reasons, we conclude that *Dedman's* determination that blood alcohol tests are non-testimonial does not comport with the Supreme Court's ruling in *Melendez-Diaz*, and *Dedman* is overruled.

(17) The State argues that *Melendez-Diaz* can be distinguished from the case at bar because the forensic reports in *Melendez-Diaz* were sworn affidavits and Exhibit 1 in the present case is not a sworn document. The State argues that *Melendez-Diaz* was a plurality opinion and, therefore, the holding "may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976); *accord Marks v. United States*, 430 U.S. 188 (1977). The narrowest grounds for the holding are found in Justice Thomas's concurrence. He joined the majority because he agreed that the reports in question were "plainly affidavits," and thus clearly were "formalized testimonial materials" governed by the Confrontation Clause. *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring). The

State therefore argues that, because Exhibit 1 in the present case was not an affidavit sworn by the declarant, it is not within the formalized testimonial materials described in *Melendez-Diaz* and, therefore, not subject to the Confrontation Clause.

{18} Contrary to the State's argument, an affidavit is merely listed as one of several examples of "formalized testimonial materials" described in *Melendez-Diaz*, 129 S. Ct. at 2532 ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized 'testimonial materials such as affidavits, depositions, prior testimony, or confessions." (internal quotation marks and citation omitted)). Even prior to *Melendez-Diaz*, it was made clear in *Crawford* that "the absence of oath was not dispositive" in determining if a statement is testimonial. *Crawford*, 541 U.S. at 52. Exhibit 1 in this case, like the certificates in *Melendez-Diaz*, are "formalized testimonial materials" in that they were made "for the purpose of establishing or proving some fact." *Melendez-Diaz*, 129 S. Ct. at 2532 (internal quotation marks and citation omitted). In *Melendez-Diaz*, the certificates were offered to prove that "the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine." *Id.* Likewise, in the present case, Exhibit 1 was offered to prove that Defendant had a BAC of 0.21 gms/100ml. As in *Melendez-Diaz*, Exhibit 1 was "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* (internal quotation marks and citation omitted). Therefore, Exhibit 1 in the present case, like the certificates in *Melendez-Diaz*, are testimonial despite the fact that they are unsworn.

{19} However, the Confrontation Clause permits the admission of testimonial statements "so long as the declarant is present at trial to defend or explain it." *Crawford*, 541 U.S. at 59 n.9 (citation omitted). Although the analyst who prepared Exhibit 1 was not present at trial, the evidence revealed that he simply transcribed the results generated by the gas chromatograph machine. He was not required to interpret the results, exercise independent judgment, or employ any particular methodology in transcribing the results from the gas chromatograph machine to the laboratory report. *Cf. Melendez-Diaz*, 129 S. Ct. at 2537-38 (stating that the methodology used in generating the reports "require[d] the exercise of judgment and present[ed] a risk of error that might be explored on cross-examination"); *State v. Aragon*, No. 31,187, slip op. at 25 (N.M. Sup. Ct. February 12, 2010) (holding that "[t]he determinations of whether a substance is narcotic and its degree of purity . . . must be classified as 'opinion,' rooted in the assessment of one who has specialized knowledge and skill"). Thus, the analyst who prepared Exhibit 1 was a mere scrivener, and Defendant's true "accuser" was the gas chromatograph machine which detected the presence of alcohol in Defendant's blood, assessed Defendant's BAC, and generated a computer printout listing its results. *See United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) ("[T]he Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial."); *United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009) ("The raw data generated by the diagnostic machines are the 'statements' *of the machines* themselves, not their operators."); *United States v. Hamilton*, 413 F.3d

1138, 1142-43 (10th Cir. 2005) (concluding that the computer-generated header information accompanying pornographic images retrieved from the Internet "was neither a 'statement' nor a 'declarant'"). Under these circumstances, we conclude that the live, in-court testimony of a separate qualified analyst is sufficient to fulfill a defendant's right to confrontation. *See People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-12 (Cal. Ct. App. 2009), *review granted and opinion superseded by People v. Rutterschmidt*, 220 P.3d 239 (2009) (holding that the testimony of a qualified analyst who did not prepare the defendant's toxicology report was admissible under the Confrontation Clause).

{20} In this case, Razatos, an SLD analyst, was qualified as an expert witness with respect to the gas chromatograph machine and the SLD's laboratory procedures. Razatos provided live, in-court testimony and, thus, was available for cross-examination regarding the operation of the gas chromatograph machine, the results of Defendant's BAC test, and the SLD's established laboratory procedures. Additionally, Razatos could be questioned about whether the operation of the gas chromatograph machine required specialized skill that the operator did not possess, involved risks of operation that might influence the test results, and required the exercise of judgment or discretion, either in the performance of the test or the interpretation of the results. Because Razatos was a competent witness who provided live, in-court testimony, we conclude that the admission of Exhibit 1 did not violate the Confrontation Clause.

{21} We recognize that, in addition to Defendant's BAC test results, Exhibit 1 also contained information regarding chain of custody. However, in

Melendez-Diaz, the United States Supreme Court indicated that chain of custody information may not be testimonial under the Confrontation Clause.[1] The Court stated that

> [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," *post*, at 2546, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, *ibid.*, from *United States v. Lott*, 854 F.2d 244, 250 (C.A.7 1988), "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

Melendez-Diaz, 129 S. Ct. at 2532 n.1.

{22} In the present case, the jury heard live, in-court testimony from the officer who arrested Defendant and the nurse who drew Defendant's blood. Although Defendant had the opportunity to cross-examine

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[1] We are also referring to the Committee on Rules of Criminal Procedure the task of drafting a notice-and-demand rule comparable to those seemingly noted with approval in *Melendez-Diaz*, 129 S. Ct. at 2541.

these individuals regarding the chain of custody, he did not do so. Indeed, the record reflects that Defendant was willing to stipulate that the nurse "drew the blood . . . properly." To the extent that Defendant based his Confrontation Clause claim on the chain of custody information contained in Exhibit 1, it is clear that his objection was simply pro forma.

{23} We reiterate that the admissibility of Exhibit 1 under the Confrontation Clause was dependant on the live, in-court testimony of a qualified analyst. Clearly, had Razatos not been present to testify, Exhibit 1 would not have been admissible because Defendant would not have had the opportunity to meaningfully cross-examine a qualified witness regarding the substance of the exhibit. A defendant cannot cross-examine an exhibit. However, because Razatos did testify, Defendant's right of confrontation was preserved and the admissibility of the exhibit depends on the application of our rules of evidence.

{24} Rule 11-703 NMRA provides, in relevant part, that

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.* Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's

> opinion substantially outweighs their prejudicial effect.

(Emphasis added.); *see also Coulter v. Stewart*, 97 N.M. 616, 617, 642 P.2d 602, 603 (1982) ("While experts may rely on hearsay under Rule 703, the hearsay itself is not admissible."). Thus, Exhibit 1 properly was admitted under Rule 11-703 if it contains facts or data of the type reasonably relied upon by experts in the field and its probative value substantially outweighs its prejudicial effect.

{25} As previously explained, the results of the gas chromatograph machine BAC test do not constitute expert opinion, but, rather, constitute facts or data of the type reasonably relied upon by experts in the field. *Cf. Aragon*, No. 31,187, slip op. at 25 (holding that an analyst could not rely on an out-of-court statement of another analyst, regarding whether a substance is narcotic and its degree of purity, because the out-of-court statement was the expert opinion of a non-testifying analyst). Moreover, the trial court reasonably could have found that the probative value of Exhibit 1 in assisting the jury to evaluate Razatos's testimony substantially outweighed its prejudicial effect. Accordingly, Razatos properly relied on the gas chromatograph machine results in his testimony and the trial court did not abuse its discretion in admitting Exhibit 1 into evidence.

{26} Although we find no error in the present case, we strongly suggest that, in future cases, the State admit into evidence the raw data produced by the gas chromatograph machine to supplement the live, in-court testimony of its forensic analyst. With the admission of this raw data, which is not subject to the constraints of the Confrontation Clause, the jury will be able to ascertain first hand the accuracy and

reliability of the analyst's testimony regarding a defendant's BAC.

B. Whether the Trial Court Abused its Discretion by Allowing Officer Snowbarger to Offer His Opinion Testimony as to the Cause of the Accident

{27} The issue that Defendant raises on appeal is whether the trial court properly qualified Officer Snowbarger as an expert witness pursuant to Rule 11-702 NMRA, and, if not, whether his testimony as to the cause of the accident was properly admitted. The following facts are relevant to this claim. During trial, defense counsel objected to Officer Snowbarger offering his opinion regarding the cause of the accident because "[t]here [was] no foundation for it. He's not an expert." The trial court then requested that the State lay a foundation to qualify him as an expert. After Officer Snowbarger testified about his experience and training in traffic reconstruction, defense counsel continued to object and was overruled by the trial court. The officer then testified that his "opinion [was] that the driver of the vehicle was not paying attention to the vehicle in front of him, or his driving habits." The prosecutor followed up asking, "[W]ere you able to formulate an opinion based on your observations as to why the driver was not paying attention?" The officer responded, "Having contacted him and observed the things that I've testified to, I believe that he was under the influence of some kind of intoxicating liquor."

{28} Whether a witness possesses the necessary expertise or a sufficient foundation has been established to permit a witness to testify as an expert witness is a matter entrusted to the sound discretion of the trial court. *Sanchez v. Molycorp, Inc.*, 103 N.M.

148, 152, 703 P.2d 925, 929 (Ct. App. 1985). Absent an abuse of discretion, a reviewing court will not disturb the trial court's decision to accept or reject such testimony. *Id.*

{29} Rule 11-702 only requires that the proponent of the testimony demonstrate that the expert has acquired sufficient "knowledge, skill, experience, training or education" so that his testimony will aid the fact finder. To the extent that Defendant is challenging Officer Snowbarger's qualifications as an expert witness, he offers no reason why Officer Snowbarger does not have the proper qualifications to testify as an expert witness. Instead, Defendant argues that only "an expert accident reconstructtionist" could offer testimony regarding the cause of the accident. At trial, Officer Snowbarger testified that, because he is in the traffic division of the police force, he has attended "a series of schools to become a traffic crash reconstructionist" and holds "certifications as a traffic crash reconstructionist." In addition, he testified that his primary duty was "to investigate traffic collisions from the very minor all the way up to fatal crashes." Defense counsel did not conduct *voir dire* examination or otherwise challenge his qualifications. Therefore, we cannot say that the trial court abused its discretion in qualifying Officer Snowbarger as a expert witness. Furthermore, we note that the jury was free to weigh every aspect of Officer Snowbarger's qualifications in their evaluation of his testimony, and any perceived deficiencies in his qualifications would be "relevant to the weight accorded by the jury to [the] testimony and not to the testimony's admissibility." *State v. Torrez*, 2009-NMSC-029, ¶ 18, 146 N.M. 331, 210 P.3d 228 (internal quotation marks and citation omitted).

{30} Defendant also challenges the admission of Officer Snowbarger as an expert witness, because the trial court failed to formally accept him as an expert. However, Defendant in his briefing before this Court fails to show what formalities are required to put the parties on notice that the trial court is accepting a witness as an expert. We reject the implication that there are formal, talismanic words that must be uttered in order to signal the court's acceptance of a witness as an expert. Instead, we determine that a witness may testify as an expert as long as the circumstances are such that the parties are on notice of the court's acceptance of that witness as an expert. In the present case, given defense counsel's objection to Officer Snowbarger's testimony on the basis that he is "not an expert," the foundation subsequently laid by the officer at the trial court's request, and the trial court's decision to overrule the defense counsel's continued objection, we conclude there was sufficient notice to the parties that the trial court was accepting Officer Snowbarger as an expert witness.

{31} Accordingly, we conclude that the trial court properly accepted Officer Snowbarger as an expert witness and did not abuse its discretion by allowing him to offer his opinion testimony as to the cause of the accident.

C. Whether the Trial Court Erred in Admitting Brother's Out-of-Court Statements

{32} The third issue that Defendant raises on appeal is whether Officer Snowbarger's testimony regarding Brother's out-of-court statements was improperly admitted because it contained impermissible hearsay and violated the Confrontation Clause. At trial, Officer Snowbarger testified that when he came in contact with Brother

and questioned him about the accident and where Defendant had gone, Brother "pointed in the direction of east, [and] said that [Defendant] had been driving the vehicle." Defense counsel objected to the statement as being hearsay, but the trial court overruled the objection and instructed the jury that Officer Snowbarger's statement "[was] not for the truth . . . but to show why . . . the officer did what he did."

{33} We first address Defendant's hearsay issue. This Court reviews the admission of hearsay for an abuse of discretion by the trial court. *State v. Salgado*, 1999-NMSC-008, ¶ 5, 126 N.M. 691, 974 P.2d 661. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Rule 11-801(C) NMRA. "An out-of-court statement is inadmissible unless it is specifically excluded as non-hearsay under Rule 11-801(D) or falls within a recognized exception in the rules of evidence, or is otherwise made admissible by rule or statute." *State v. McClaugherty*, 2003-NMSC-006, ¶ 17, 133 N.M. 459, 64 P.3d 486 (citation omitted).

{34} The State argues that the statements were offered to show why the police officer acted as he did and not for its truth; therefore, they were properly admitted as non-hearsay. In *State v. Rosales*, 2004-NMSC-022, ¶ 16, 136 N.M. 25, 94 P.3d 768, this Court noted that "[e]xtrajudicial statements or writings may properly be received into evidence, not for the truth of the assertions therein . . . but for such legitimate purposes as that of establishing knowledge, belief, good faith, reasonableness, motive, effect on the hearer or reader, and many others." In addition, the evidence must have some proper probative effect upon or relevancy to an issue in the

case in order to be admissible. Rule 11-402 NMRA; *State v. Alberts*, 80 N.M. 472, 475, 457 P.2d 991, 994 (Ct. App. 1969). Courts have been especially reluctant to allow testimony of a police officer to explain his conduct during the course of the investigation, because there is high potential for abuse by prosecution to admit highly prejudicial and otherwise inadmissible hearsay and the evidence is seldom relevant. *State v. Otto*, 2007-NMSC-012, ¶ 28, 141 N.M. 443, 157 P.3d 8 (Chavez, J., dissenting) ("In criminal cases the prosecution is fond of offering evidence of inculpatory out-of-court assertions as 'background' to explain why law enforcement agents decided to investigate a defendant. Such evidence is seldom relevant." (quoting David F. Binder, *Hearsay Handbook*, § 2:10, at 2-40 (4th ed. 2001))); *see Alberts*, 80 N.M. at 475, 457 P.2d at 994 ("The naming of defendants as persons engaged in 'illegal marijuana traffic,' for the purpose of showing why [an officer] conducted an investigation, is not a legitimate reason for admitting [hearsay] testimony."); *see also State v. Blevins*, N.E.2d 1105, 1108 (Ohio Ct. App. 1987) ("[T]he potential for abuse in admitting such statements is great where the purpose is merely to explain an officer's conduct during the course of an investigation.").

{35} Despite the trial court's instruction to the jury that Officer Snowbarger's statements should not be considered for their truth, we find no other purpose for admitting these statements other than to prove that Defendant was the driver of the vehicle and headed east, as opposed to north to the creek, as he claimed in his testimony. The police officer's reason for pursuing Defendant was not a relevant issue at trial, therefore, the statements were hearsay and inadmissible.

{36} However, evidence admitted in violation of our hearsay rules is grounds for a new trial unless the error was harmless. *See State v. Downey*, 2008-NMSC-061, ¶ 39, 145 N.M. 232, 195 P.3d 1244. Where a defendant has established a violation of court rules, non-constitutional error review is appropriate, and a reviewing court should only conclude that a non-constitutional error is harmless when there is no *reasonable probability* the error affected the jury's verdict. *State v. Barr*, 2009-NMSC-024, ¶¶ 47-48, 146 N.M. 301, 210 P.3d 198.

{37} To determine whether there is a reasonable probability that a non-constitutional error contributed to a verdict, the appellate courts should consider whether there is "(1) substantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear minuscule; and (3) no substantial conflicting evidence to discredit the State's testimony." *Id.* ¶ 56 (footnote omitted). No one factor is determinative, but all three factors when considered in conjunction with one another "provide a reviewing court with a reliable basis for determining whether an error is harmless." *Id.* ¶ 55. In applying these factors, we must not re-weigh the evidence against a defendant, but rather determine "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* ¶ 57 (citation omitted). "Accordingly, in some circumstances where, in our judgment, the evidence of a defendant's guilt is sufficient even in the absence of the trial court's error, we may still be obliged to reverse the conviction if the jury's verdict appears to have been

tainted by error." *State v. Macias*, 2009-NMSC-028, ¶ 38, 146 N.M. 378, 210 P.3d 804.

{38} First, we examine whether there was substantial evidence to support the conviction without reference to the improperly admitted evidence. The jury could have reasonably relied on Mr. Jackson's testimony that immediately after the accident and before Defendant left the accident scene, Defendant had blood shot eyes and alcohol on his breath, in reaching its conclusion that Defendant was intoxicated at the time of the accident even before he left the accident scene. Additionally, a reasonable jury could have considered this testimony coupled with the testimony of the two arresting officers to conclude that Defendant was intoxicated to the slightest degree at the time of the accident. Based on the testimony of Mr. Jackson and Officer Snowbarger that Defendant was only away from the accident scene for approximately ten minutes when he was found by the officer, the jury could have reasonably concluded that this would not be enough time for Defendant to cross the street, walk around, climb over a fence, walk to the side of the creek, and drink a pint and a half-gallon of vodka, as Defendant claimed at trial.

{39} The second factor requires us to assess the impermissible evidence in light of the permissible evidence, the disputed factual issues, and the essential elements of the crime charged. Our focus is not limited to the quantity of impermissible evidence, but, rather, encompasses the quality of that evidence and its likely impact on the jury. *See State v. Moore*, 94 N.M. 503, 505, 612 P.2d 1314, 1316 (1980) (recognizing that "a trial can be prejudiced by testimony lasting but a fraction of a second"). We

conclude that the improperly admitted statements were insignificant in comparison to the permissible evidence because they did not relate to centrally disputed facts in the case. First, the parties did not dispute that Defendant was driving the vehicle at the time of the accident; therefore, Brother's statement that Defendant was driving had no impact on the jury's resolution of any disputed factual issue. Second, the fact that Brother pointed east while Defendant testified that he headed north is not inconsistent with Defendant's claim that he became intoxicated during his flight from the accident scene, especially considering that Defendant testified that he "walked around" before heading to the creek, where he encountered the men with whom he drank. Thus, this minor discrepancy, even if noticed by the jury, is not one which would have tainted their determination of Defendant's guilt.

{40} Finally, we address the third factor, namely, whether there was substantial conflicting evidence to discredit the State's testimony. There is no conflicting evidence regarding the fact that Defendant was driving the vehicle at the time of the accident. The only conflicting evidence regarding which direction Defendant went when he fled the accident was Defendant's testimony that he went north instead of east. Considering the minimal probative value of the hearsay testimony and the strength of the countervailing evidence, we conclude that the trial court's error in admitting the hearsay statements was harmless.

{41} We next address Defendant's Confrontation Clause claim. Generally, whether out-of-court statements are admissible under the Confrontation Clause is reviewed de novo, as a question of law. *State v. Ruiz*, 120 N.M. 534, 536, 903 P.2d 845, 847 (Ct. App.

1995), *abrogated by State v. Martinez*, 2007-NMSC-025, 141 N.M. 713, 160 P.3d 894. However, because counsel did not object under the Confrontation Clause in the trial court, this Court must review the issue under fundamental error. *State v. Osborne*, 111 N.M. 654, 662, 808 P.2d 624, 632 (1991). "Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *State v. Baca*, 1997-NMSC-045, ¶ 41, 124 N.M. 55, 946 P.2d 1066, *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36, 146 N.M. 357, 210 P.3d 783. Defendant concedes that there was no material issue rising to the level of fundamental error with regard to Brother's statement that Defendant was driving when the accident occurred; therefore, we do not address this question. However, Defendant argues that there was a material issue concerning Brother's indication that Defendant headed east, because Defendant, to the contrary, testified at trial that he headed north, climbed over a fence, and then met the Native American men that he drank with by the creek. The Defendant claims that this statement prejudiced Defendant's case because "the direction Mr. Bullcoming walked in, where Mr. Bullcoming ended up, and how long he was gone, were critical to the jury's determination of guilty." As mentioned above, this statement had little probative value especially in light of the other evidence presented by the prosecution. Thus, we conclude that there was no fundamental error, because Defendant was not prejudiced in a significant way by the admission of the statement.

CONCLUSION

{42} We conclude that the blood alcohol report, prepared by an analyst who simply transcribed the results generated by a gas chromatograph machine, properly was admitted into evidence through the live, in-court testimony of a separate qualified analyst. We further conclude that, although Officer Snowbarger was never formally qualified as an expert witness, the parties understood that he was testifying as an expert witness and, thus, he could opine regarding the cause of the accident without witnessing it. Finally, though the trial court erred in admitting Brother's out-of-court hearsay statements, the error was harmless. Thus, we affirm Defendant's conviction.

IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR: EDWARD L. CHAVEZ, Chief Justice, PATRICIO M. SERNA, RICHARD C. BOSSON, and CHARLES W. DANIELS, Justices. N.M., 2010.

COURT OF APPEALS OF NEW MEXICO.

No. 26,413.

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

DONALD BULLCOMING,
Defendant-Appellant.

June 4, 2008.
Certiorari Granted, No. 31,186, July 21, 2008.

OPINION

WECHSLER, Judge.

{1} As per the Corrected Judgment, Sentence, Order Partially Suspending Sentence and Commitment to the Department of Corrections, Defendant Donald Bullcoming was convicted of the offense of Aggravated Driving While Under the Influence of Intoxicating Liquor and sentenced based on four prior DWI convictions. He appeals, raising five issues: (1) that the district court erred in denying a motion for mistrial based on the prosecutor's improper comment on silence in closing argument, (2) that the district court abused its discretion by allowing testimony by a police officer about the cause of an accident involving Defendant when the officer did not witness the accident, (3) that the district court erred in admitting into evidence blood draw results when the analyst

who prepared the results was not available to testify, (4) that the district court erred in admitting into evidence the hearsay statement of Defendant's brother, and (5) that the State did not sufficiently prove Defendant's four prior DWI convictions. We affirm Defendant's conviction. In doing so, we agree with the district court's use of the preponderance of the evidence standard in addressing Defendant's prior DWI convictions.

BACKGROUND

{2} Defendant was arrested after an automobile accident in which Defendant, while driving his sibling's vehicle, ran into another truck at an intersection. After the accident, the other driver got out of his truck and went back to the vehicle that Defendant was driving and asked for Defendant's license and registration. The other driver noticed the smell of alcohol coming from Defendant's vehicle. When the other driver returned to his truck, he asked his wife to call the police. As the other driver examined the rear end of his truck for damage, Defendant and his sister approached him. The other driver spoke with both of them and obtained insurance information. The other driver smelled alcohol emanating from Defendant and also observed that Defendant had bloodshot eyes. When the other driver told Defendant that he needed to get a police report and had called the police, Defendant excused himself, saying that he needed to go to the restroom, and went across the street toward a medical complex. The other driver testified that the police brought Defendant back to the scene of the accident approximately ten minutes later.

{3} Defendant testified that he had not been drinking for about ten hours that day. He said that

he was driving because the others in the vehicle had been drinking and were drunk. According to Defendant, the odor of alcohol in the vehicle came from them, rather than him. Defendant further testified that he left the scene after the other driver told him that the police had been called because he was afraid that he was going to be arrested. Defendant knew he had an outstanding warrant because he had violated his probation in Oklahoma by leaving that state. He walked to a creek where he met other men who were drinking vodka, and he testified that he drank with them for about thirty minutes and that they drank about a pint and a half gallon. He was picked up by the police when he returned to the road. He was intoxicated when he was given field sobriety tests back at the scene of the accident.

COMMENT ON SILENCE

{4} In closing argument, on rebuttal, the prosecutor argued that Defendant did not tell the police officers anything about drinking vodka with others. He argued that if Defendant had told the officers that he "was just back in the bushes with three or four guys and I drank a whole load of vodka," and "I'll show you," one of the officers could have gone to the bushes and investigated and asked the others if Defendant had been drinking. Defendant objected on Fifth Amendment grounds. The district court then stated: "Ladies and gentlemen of the jury, . . . Defendant has a right to remain silent and be presumed innocent. And, you are not to infer from counsel's argument that . . . Defendant had any duty to say anything." After the district court excused the jury, Defendant moved for a mistrial, contending that the prosecutor's argument was "so prejudicial and so in violation

of the law, of the constitution," that it justified a mistrial. The district court denied the motion, stating that the comment was only a casual comment that was cured by its instruction to the jury.

{5} On appeal, Defendant argues that the comment was not casual; rather, Defendant asserts that its calculation was demonstrated by the prosecutor's questioning of Officer Martin Snowbarger about his conversation with Defendant. When, as here, the facts are not in question, the issue of whether the prosecutor made an improper comment on the defendant's silence is a question of law that we review de novo. *State v. Foster*, 1998-NMCA-163, ¶ 8, 126 N.M. 177, 967 P.2d 852. We may affirm the district court if it was correct for any reason, as long as the basis for such ruling was raised before the district court. *State v. Granville*, 2006-NMCA-098, ¶ 12, 140 N.M. 345, 142 P.3d 933.

{6} We now review the record, which demonstrates that the prosecutor's comment related to Defendant's pre-arrest, as opposed to his post-arrest, silence. Officer Snowbarger first encountered Defendant on the other side of a bridge away from the scene of the accident and spoke with him at that time. He requested another police car to transport Defendant back to the accident scene. He arrived back at the scene at the same time as Defendant and was there during the time that Officer David Rock administered field sobriety tests to Defendant. Officer Snowbarger testified that he issued Defendant three citations but that he did not issue a citation for DWI. Officer Rock testified that when he arrived at the scene, Defendant was still in a police car. Officer Rock removed Defendant from the car, observed him walk to the sidewalk, and asked him, "Have you had anything to

drink today?" Defendant responded that he "had one this morning at 6:00 a.m." Officer Rock wrote Defendant's response in his report. Officer Rock then administered the field sobriety tests. After completing the tests, Officer Rock concluded that Defendant was intoxicated and impaired, arrested him, and took him to the police station for booking. Although Officer Rock's testimony is not clear as to the exact location where he read Defendant his rights under the New Mexico Implied Consent Act, he testified that he did so after arresting Defendant. Ultimately, he obtained a warrant and took Defendant to the emergency room for a blood alcohol test.

{7} The prosecution may use a defendant's pre-arrest silence for impeachment purposes without infringing upon his or her Fifth Amendment rights. *See State v. Gonzales*, 113 N.M. 221, 229, 824 P.2d 1023, 1031 (1992); *Foster*, 1998-NMCA-163, ¶¶ 13-14. Although the transcript does not reflect exactly when Defendant was given his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), we assume that it was not until after Officer Rock arrested him.

{8} With this factual predicate, we conclude that the context of the prosecutor's statement in rebuttal shows that he was only referencing Defendant's pre-arrest silence. First, the prosecutor discussed the police officers' ability to investigate by going to the bushes and asking anyone found there if Defendant had been drinking. That time period was, by necessity, limited, because anyone present in the bushes had the ability to leave that area. Second, although a police investigation may certainly continue after an arrest, the prosecutor's discussion was limited to the police officers' investigation in the context of this case, which impliedly referenced only the

investigation at the scene when the officers had the present ability to return to the bushes while someone with knowledge of Defendant was still present. Third, the prosecutor made reference to Defendant's statement to Officer Rock that he had not had anything to drink since 6:00 a.m. That statement was a pre-arrest statement.

{9} Thus, from the factual context, as well as the wording of the prosecutor's argument, we conclude that it reasonably related only to Defendant's pre-arrest silence. It did not merit a granting of Defendant's motion for a mistrial.

OFFICER SNOWBARGER'S TESTIMONY ABOUT THE CAUSE OF THE ACCIDENT

{10} Defendant contends that Officer Snowbarger was not qualified to offer opinion testimony concerning the cause of the accident because he was not qualified as an expert and, testifying as a lay witness, he could not testify about causation because he did not witness the accident. Officer Snowbarger testified at trial as the State's witness. He was dispatched to and observed the accident scene. After being informed that Defendant had left the scene, he also left the scene, located Defendant, and requested the transport of Defendant back to the scene by another officer. Defense counsel objected when the prosecutor asked Officer Snowbarger if he was able to form an opinion about the cause of the accident. Upon the district court's inquiry as to a ground for the objection, defense counsel stated, "There's no foundation for it. He's not an expert." The prosecutor offered to lay a foundation, and Officer Snowbarger testified that he was assigned to the traffic division and had the primary duty of investigating traffic accidents. He testified that he had received training in basic

accident reconstruction and traffic crash reconstruction and was certified as a traffic crash reconstructionist. Officer Snowbarger also testified that he had formed opinions as to the contributing factors to Defendant's accident, and when asked to state his opinions, defense counsel again objected, stating, "I would still object, Your Honor." The district court overruled the objection. Accordingly, Officer Snowbarger testified to his opinion as to the contributing factors of Defendant's accident, stating that "the driver of the vehicle was not paying attention to the vehicle in front of him, or his driving habits." When asked if he was able to formulate an opinion based on his observations as to why the driver was not paying attention, again over objection, Officer Snowbarger testified that he believed that the driver "was under the influence of some kind of intoxicating liquor."

{11} We do not agree with Defendant's contention that Officer Snowbarger was not qualified as an expert to provide his opinion about the cause of the accident. Under Rule 11-702 NMRA, a witness may testify as to an expert opinion if the "specialized knowledge" of the witness "will assist the trier of fact" and the witness is qualified as an expert to provide the opinion by virtue of "knowledge, skill, experience, training or education." The district court, in its discretion, decides whether a witness qualifies as an expert under Rule 11-702. *State v. Downey*, 2007-NMCA-046, ¶ 11, 141 N.M. 455, 157 P.3d 20, *cert. granted*, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459. When defense counsel raised the issue of Officer Snowbarger's qualifications by objecting for lack of foundation, the prosecutor elicited his qualifications. Officer Snowbarger testified about his training and his certification as a traffic crash

reconstructionist. Defense counsel then only restated her earlier objection of lack of foundation. She did not seek to engage Officer Snowbarger in a voir dire examination or otherwise challenge his qualifications. The district court acted within its discretion in allowing Officer Snowbarger's causation testimony based on the foundation laid concerning his qualifications.

{12} Nor did the district court abuse its discretion because the prosecutor did not formally proffer Officer Snowbarger as an expert witness. The prosecutor clearly presented the issue to the district court. He asked Officer Snowbarger about whether he had formed any opinions about the cause of the accident. After laying a foundation for testimony about his opinion, the prosecutor asked Officer Snowbarger to state his opinions. There was no lack of clarity concerning the scope of the question calling for Officer Snowbarger's expertise or of the relationship of his qualifications to his ability to present an opinion in response to the question. Defendant does not indicate how a formal proffer would have served any meaningful purpose or how he was prejudiced by the absence of a formal proffer. *See State v. Garcia*, 76 N.M. 171, 176, 413 P.2d 210, 213-14 (1966) (explaining that the district court has substantial discretion, based on its perception of the offered expert's qualifications, in deciding whether to allow or deny the testimony of such a witness); *see also State v. Gregoroff*, 951 P.2d 578, 580-81 (Mont. 1997) (concluding that the district court did not abuse its discretion in admitting the expert testimony of a law enforcement officer even though she was never "formally offer[ed]" as an expert witness by the prosecution).

BLOOD DRAW RESULTS

{13} The State introduced evidence of the analysis of the blood sample taken from Defendant through the testimony of an analyst of the New Mexico Department of Health Scientific Laboratory Division, Toxicology Bureau. The witness was not the analyst who performed the analysis of the blood sample and did not prepare the blood analysis report admitted into evidence. Defendant objected to the analyst's testimony on the basis that it violated Defendant's right of confrontation. Defendant further objected to the receipt of the blood analysis report as a business record because it was prepared in anticipation of litigation. The district court allowed the report to be admitted into evidence as a business record.

{14} On appeal, Defendant argues that the district court erred in allowing the blood draw results. Relying on *Crawford v. Washington*, 541 U.S. 36 (2004), he contends that testimonial statements may not be introduced against a defendant at trial unless both the declarant is unavailable and the defendant has had the opportunity to cross-examine the declarant. According to Defendant, the State did not prove that the analyst who prepared the report was unavailable to testify at trial, and Defendant did not have the opportunity to cross-examine that analyst. Defendant further acknowledges that our Supreme Court has decided this issue in *State v. Dedman*, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628, but argues that decisions in other states following *Crawford* have reached a different result than our Supreme Court in *Dedman*. We note that although Defendant argued in the district court that the witness's testimony should have been excluded

because of late disclosure, Defendant does not raise that ground as a basis for reversal on appeal.

{15} We begin and end our legal analysis with *Dedman* because it is dispositive. In *Dedman*, the nurse who had withdrawn blood from the defendant for testing by the Scientific Laboratory Division (SLD) was not available to testify at trial. *Dedman*, 2004-NMSC-037, ¶¶ 3-4. The SLD toxicologist testified at trial that the blood alcohol report was the product of the "regularly conducted business activity" of SLD. *Id.* ¶ 43. Our Supreme Court held that there was no indication the report was untrustworthy or unreliable and further held that the report was admissible under the public records exception to the hearsay rule. *Id.* ¶¶ 24, 44. It stated that "ordinarily a blood alcohol report is admissible as a public record and presents no issue under the Confrontation Clause because the report is non-testimonial and satisfies" the test of *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36, concerning the admission of hearsay evidence under the Confrontation Clause. *Dedman*, 2004-NMSC-037, ¶ 45.

{16} In this case, the SLD toxicologist testified that the report was used and kept in the ordinary course of SLD's business and also testified about the procedure used in preparing the report. As in *Dedman*, there was no evidence that there was any deviation from ordinary practice or that the report was untrustworthy or unreliable. *See id.* ¶ 44. We are bound by *Dedman*, a decision of our Supreme Court, and we therefore do not address the opinions of other states on the issue. *See State v. Manzanares*, 100 N.M. 621, 622, 674 P.2d 511, 512 (1983) (explaining that this Court is bound by the precedents of our

Supreme Court "even when a United States Supreme Court decision seems contra").

{17} We do not agree with Defendant's argument at oral argument that *State v. Almanza*, 2007-NMCA-073, 141 N.M. 751, 160 P.3d 932, is inconsistent with *Dedman*. In *Almanza*, because of short notice to subpoena the chemist to appear at trial, the prosecution introduced the telephonic testimony of a New Mexico State Crime Lab chemist concerning the character of the substance the state alleged was illegal drugs. *Almanza*, 2007-NMCA-073, ¶¶ 1-3. This Court held that the testimony violated the defendant's confrontation rights. *Id.* ¶¶ 1, 12-13. However, *Almanza* did not involve the issue of the testimonial nature of a report admissible under *Roberts*. As discussed in *Dedman*, the blood alcohol report in the present case was non-testimonial and prepared routinely with guarantees of trustworthiness. *See Dedman*, 2004-NMSC-037, ¶ 44.

HEARSAY STATEMENT OF DEFENDANT'S BROTHER

{18} Officer Snowbarger testified, over Defendant's objection, to statements that were told to him by Defendant's brother, who did not testify at trial. He testified that Defendant's brother told him that Defendant had been driving the vehicle and pointed in the direction that Defendant had gone from the scene. The district court responded to Defendant's hearsay objection by instructing the jury that the testimony was not for the truth of the statements; rather, it served to show that it caused Officer Snowbarger to take further action. Defendant did not make a Confrontation Clause objection.

{19} We review the admission of hearsay evidence under an abuse of discretion standard. *State v. Torres*, 1998-NMSC-052, ¶ 15, 126 N.M. 477, 971 P.2d 1267, *overruled on other grounds by State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 23, 136 N.M. 309, 98 P.3d 699. The district court did not abuse its discretion in allowing this testimony. First, it did not allow hearsay testimony because it instructed the jury not to accept the testimony for the truth of what Defendant's brother said. Rule 11-801(C) NMRA (defining hearsay as "a statement . . . offered in evidence to prove the truth of the matter asserted"). Second, even if the testimony had been hearsay, there was no prejudice to Defendant. *See Clark v. State*, 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991) (noting that error in the admission of evidence in a criminal case must be prejudicial and not harmless and that standard is met "if there is a reasonable possibility that the evidence complained of might have contributed to the conviction"). There was no material issue that Defendant had been driving the vehicle or had left the scene in a particular direction.

{20} As to the Confrontation Clause, our review is de novo. *Torres*, 1998-NMSC-052, ¶ 20. In this case, we review for fundamental error because Defendant did not raise an objection in the district court. *See State v. Munoz*, 2006-NMSC-005, ¶ 12, 139 N.M. 106, 129 P.3d 142. Fundamental error exists in this context if Defendant's "innocence is indisputable or the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand." *State v. Hennessy*, 114 N.M. 283, 287, 837 P.2d 1366, 1370 (Ct. App. 1992) (internal quotation marks and citation omitted). No such circumstances exist in this case because, as we have stated, there was no material issue as to whether Defendant was driving

or whether he left the scene in a particular direction after the accident.

PROOF OF PRIOR DWI CONVICTIONS

{21} Sentencing for a DWI conviction in New Mexico is graduated depending on a defendant's prior convictions, if any. *See* NMSA 1978, § 66-8-102(E) to (J) (2005) (amended 2007). The district court found that Defendant had at least four prior convictions of DWI and sentenced him on the basis that his conviction in this case was his fifth DWI conviction. As a result, Defendant's conviction was for a fourth degree felony, subjecting him to a two-year term of imprisonment, which term was imposed by the district court. Section 66-8-102 (H).

{22} In proving prior DWI convictions for purposes of enhancing a DWI conviction, the state has the "initial burden of presenting evidence of the validity of each" of a defendant's prior DWI convictions. *State v. Gaede*, 2000-NMCA-004, ¶ 8, 128 N.M. 559, 994 P.2d 1177. If the state presents a prima facie case, the defendant may present contrary evidence. *Id.* The state continues to have the ultimate burden of persuading the district court, as factfinder, of the validity of each of the convictions. *Id.*

{23} Defendant argues on appeal that the State's evidence was insufficient to prove that Defendant had four prior convictions. As part of his argument, he asserts that the State had to prove the convictions to a standard of beyond a reasonable doubt rather than the lesser standard, to a preponderance of the evidence, that was used by the district court.

{24} Based on documents that were before the district court, the district court found that Defendant had been convicted of DWI in Elk City Municipal

Court, Andarko, Oklahoma, on December 30, 1993; in Clinton Municipal Court, Oklahoma, on April 17, 1995; in Blaine County Oklahoma, on September 28, 2003; and in Dewey County, Taloga, Oklahoma, on December 9, 2004. Defendant contested the use of the 1993 and 1995 convictions to the district court, but the district court found that the convictions were valid. On appeal, although Defendant notes the objections below, he does not argue that the district court erred except in its application of the standard of proof. We thus understand Defendant's argument to be that the validity of those convictions depends on the district court's proper application of the standard of proof.

{25} In making his standard of proof argument, Defendant acknowledges that the New Mexico Supreme Court, in *State v. Smith*, 2000-NMSC-005, 128 N.M. 588, 995 P.2d 1030, held that in proving prior convictions for habitual offender enhancement, the State need only meet the standard of preponderance of the evidence. Defendant further acknowledges this Court's statement in *State v. Sedillo*, 2001-NMCA-001, ¶ 5, 130 N.M. 98, 18 P.3d 1051, that proof beyond a reasonable doubt is not necessary to prove prior DWI convictions for sentencing in a DWI case. Defendant relies on cases of the United States Supreme Court starting with *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), holding that the proof of "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." According to Defendant, *Apprendi* was decided after *Smith*, and, in light of *Apprendi* and its United State Supreme Court progeny, *Sedillo* was wrongly decided.

{26} But, Defendant's argument disregards the express holding of *Apprendi*. In reaching its conclusion, the United States Supreme Court explicitly excluded "the fact of a prior conviction" from the type of facts that must be proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. In doing so, the United States Supreme Court expressly confirmed its earlier position in *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (explaining that the U.S. Constitution does not require prior convictions that increase a maximum penalty to be proved beyond a reasonable doubt), that facts of prior convictions do not fit within the same category as other facts that increase "the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490.

{27} A beyond a reasonable doubt standard does not apply to a finding of a prior DWI conviction for purposes of DWI sentencing. *See Sedillo*, 2001-NMCA-001, ¶¶ 5, 10. There is no indication in the record on appeal that there was insufficient evidence to support the district court's findings of Defendant's prior DWI convictions.

CONCLUSION

We affirm Defendant's conviction.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR: JONATHAN B. SUTIN, Chief Judge, and CELIA FOY CASTILLO, Judge. N.M.App., 2008.

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

[Filed DEC 15 2006]

No. 26,413
San Juan County
CR-05-937

STATE OF NEW MEXICO,
Plaintiff-Appellee,

vs.

DONALD BULLCOMING,
Defendant-Appellant.

TRANSCRIPT FROM AUDIO RECORDING
OF JURY TRIAL
November 16, 2005

[As corrected according to Counsel's review
of the audio recording, which is the official record
under New Mexico law]

BEFORE THE HONORABLE THOMAS J. HYNES
ELEVENTH JUDICIAL DISTRICT COURT

APPEARANCES

For the Plaintiff: PAUL WAINWRIGHT

For the Defendant: BLAISE SUPLER

* * * *

[128] THE COURT: Now, how about the jury instructions?

MS. SUPLER: I didn't see any problems with those. I do have a problem, though, with their next witness.

MR. WAINWRIGHT: Yeah. I think—

THE COURT: Wait. Wait. Wait. So, we don't have any problem with the—

MS. SUPLER: As we talked about taking out that one, I didn't see—

THE COURT: Okay. I took that one out. All right. Now, the next witness. What about the next witness?

[129] MR. WAINWRIGHT: We have an admissibility issue regarding the blood results.

THE COURT: Who's the next witness?

MR. WAINWRIGHT: A young Greek gentleman from the lab who—

THE COURT: He's here or he's on the phone?

MR. WAINWRIGHT: He's here. He's here.

THE COURT: Okay. And, he—what's the problem?

MR. WAINWRIGHT: He didn't—he's not Curtis that did the [analyst]. He's from the lab, and he's going to testify—

THE COURT: That this is a business record?

MR. WAINWRIGHT: Right.

THE COURT: All right. And, so, would you object to it coming in as a business record?

MS. SUPLER: I do, Your Honor.

THE COURT: And, the reason being?

MS. SUPLER: Because I think—I think the document itself violates the confrontation clause, the

chain of custody is not met, there's a different person whose signature on here is attesting to the fact that she received the vials and the seals were intact. That person is—I don't believe—planning on testifying.

THE COURT: No, they never—they would never bring that person in.

[130] MS. SUPLER: And, he can't—I submit he can't testify. He didn't do the analysis of this blood sample, so he can't—

THE COURT: Well, did he have any—what is his expertise?

MR. WAINWRIGHT: He—he runs the program.

THE COURT: All right.

MS. SUPLER: He is an analyst, but he didn't do this analysis.

THE COURT: I know. All right.

MR. WAINWRIGHT: The individuals don't do—the machine does the—it's like a breath test.

THE COURT: Yeah. And, he could tell us how the machine works?

MR. WAINWRIGHT: Correct.

THE COURT: All right. Well, I'm going to allow it as a business record. I don't think it's prohibited by—help me here—

MR. WAINWRIGHT: Judge, if you're asking me to get—

THE COURT: Case that the Defense—what's—*Crawford*. I don't think it's prohibited by *Crawford*, and that would be a good reason to appeal, because all those questions have to be answered. And, they're

not answered in *Crawford*, although I think *Crawford* said business records will be allowed. I think *Crawford* specifically—I think [131] they said, well—*Crawford* said, well, we will have to wait and answer all of these other questions later on, but some traditional hearsay exceptions—and I think they said—like business records, will continue to be allowed.

MS. SUPLER: But, Your Honor—I—and, isn't there an exception for business records that are prepared in anticipation of litigation, which is exactly what this is? I don't think this qualifies as a business record because of that. It—

THE COURT: Well, I think your—

MS. SUPLER: (Inaudible.)

THE COURT: —I think your—

MS. SUPLER: It's prepared clearly in anticipation of litigation.

THE COURT: I think your objection is noted, and it would be something that ought to be cleared up by the Court of Appeals, and this might be a good case to do it in. But, the other problem is, you admitted he was intoxicated. I'm not too sure why we—

MS. SUPLER: No.

THE COURT: —I—you admitted it in opening statement. (Inaudible.)

MS. SUPLER: But, Your Honor—but, Your Honor—that was based on our hearing yesterday and the ruling this morning that the analyst would be allowed to testify. I had [132] no idea—this is the first I learned when I met the—in fact, even when Mr. Wainwright told me the witness was out there, he didn't disclose to me it's not the analyst.

THE COURT: All right. Well, I'll—all right. All right. Well, I—you've made your record. You made your record.

MR. WAINWRIGHT: Thank you, Your Honor.

THE COURT: All right. Can you call in—

MS. SUPLER: All my point is, our opening and our defense in this case, may very well have been dramatically different had I known that the analyst was not available.

THE COURT: Well—you know, believe it or not—where's Mr. Wainwright—as hard as it may be to believe that when Mr. Wainwright and I started out in our practice of law, there were no breath tests or blood tests. They just brought in the cop, and the cop said, "Yeah, he was drunk." And, then, you decide. But, now—

MS. SUPLER: Right. And, be that as it may, the whole defense may have been different.

THE COURT: So, the question—the issue here is, I seriously doubt you're going to present any evidence that the Defendant wasn't intoxicated, but that remains to be seen.

MS. SUPLER: Okay.

MR. WAINWRIGHT: And, this is an implied consent [133] document, essentially, Your Honor.

THE COURT: What?

MR. WAINWRIGHT: It's pursuant to the implied consent law.

THE COURT: All right. Well, (inaudible).

MS. SUPLER: My client's signature isn't on it. It's not a statement of my client.

THE COURT: Bring in the jury. Please rise for the jury.

State call the next witness.

MR. WAINWRIGHT: The State would call Mr. Razatos, Your Honor.

THE COURT: Do you solemnly swear or affirm that the testimony you are about to give in the cause herein is the truth, the whole truth, and nothing but the truth, under penalty of law?

THE WITNESS: I do.

THE COURT: Have a seat and state your name, sir.

THE WITNESS: My name is Gerasimos Razatos.

FEMALE VOICE: Would you spell your last name?

THE WITNESS: R-a-z-a-t-o-s.

FEMALE VOICE: First name?

THE WITNESS: Gerasimos, G-e-r-a-s-i-m-o-s.

FEMALE VOICE: Thank you.

THE WITNESS: Uh-huh.

[134] DIRECT EXAMINATION OF GERASIMOS RAZATOS

BY MR. WAINWRIGHT:

Q Sir, would you please state your name? You already did that, I'm sorry. Okay. By whom are you employed?

A I work for the New Mexico Department of Health Scientific Laboratory Division, Toxicology Bureau.

Q Okay. And, how long have you been employed with that agency?

A Four years.

Q Okay. And, in what capacity are you employed by that agency?

A I'm one of the analysts, or one of the scientists at the laboratories.

Q. Okay. And, what are your job duties, sir?

A I—the bureau is in charge of overseeing the breath and blood alcohol programs, testing programs, for the State of New Mexico. So, as one of the analysts there, I help in overseeing the administration of these programs throughout the State. I also am required to give Court testimony, and teaching of law enforcement.

Q Okay. And, have you had any special training to acquire this position?

A I have a bachelors degree in science from the University of New Mexico, with minor studies in chemistry. [135] There's continuing education within the laboratories that we strive to attain. Plus, I'm a member of the society of forensic toxicologists, which is a national organization here in the United States that oversees forensic testing, and I've also attended a lot of meetings based on blood alcohol analysis.

Q Now, have you had occasion to review a blood alcohol analysis regarding Mr. Bullcoming?

A I have.

Q Okay. And, we've been through the testimony of the police officer as to what he does, and the nurse as to what she does. And, then, she handed it back to the police officer. How does your agency receive these particular kits?

A The particular blood kits can come to the laboratories either in person. The officer can actually bring them and drop them off to us. Or, we can receive them by mail. So—

Q Well, let me ask you this. How do you usually receive them from the Farmington area?

A Through mail.

Q Okay. Go ahead. And, what's the process after you receive it via the mail?

A So, what we do is, we will get the sample in the mail. There is a form that accompanies this blood sample. And, what we do is we make sure that the name on that [136] particular form corresponds with the name that's put on the blood vials.

MS. SUPLER: Your Honor, I'm going to object to what's done in the status quo. I don't object to what was done in this case.

MR. WAINWRIGHT: I'll rephrase the question, Your Honor.

THE COURT: All right.

BY MR. WAINWRIGHT: Sir, let me hand to you what has been marked for identification purposes as State's Exhibit 1. Is that—is that a document that you're familiar with?

A Yes.

Q Is that what we've just been talking about?

A Correct.

Q Okay. Now, the top portion of State's Exhibit 1 is filled out by the officer?

A Correct.

Q And, then, the nurse?

A Correct.

Q And, then, your agency takes it from there. Is that correct?

A Correct.

Q What's the next area that we deal with?

MS. SUPLER: And, I will object, based on my previous [137] argument.

THE COURT: Yes, ma'am. [And you may] continue the objection.

MS. SUPLER: I understand. I appreciate that. Thank you, Your Honor.

Q BY MR. WAINWRIGHT: Go ahead, sir.

A So, the very next section is the certificate of receiving employee. This is where the receiving employee receives the blood, whether it's in person or in mail.

Q. Well, let me ask you this. Is this document, State's Exhibit 1, used in the normal course of business at your agency?

A Yes, it is.

Q And, is this kept in the normal course of business at your agency?

A Yes, it is.

Q And, is this an official—essentially, an official State document?

A It is.

Q Okay. So, the—you tag it in, or you log it in. Is that correct?

A We do.

Q And, what's the next—what do you do next in the process?

A In the logging in process or—

[138] Q Well, what—is there more to it than just logging it in?

A Well, we log it in, we assign it a particular number. It's an identifying number that we use internally. And, then, we set it aside for analysis.

Q Okay. Now, what are you receiving?

A In this particular case—

Q Yes. Let's keep it to this particular case.

A A blood sample.

Q Okay. And, how do you receive the blood sample? What's in the kit that's sent to you?

A Two vials of blood and—

Q Why two vials?

A It's the standard that we have at the laboratories. We like to have two vials of blood. It's been set out by the director of the laboratories as two vials of blood.

Q Okay. And, how long do you keep that?

A Depending on the testing that we do, we have a different set that we will retain samples—blood samples that are done—just alcohol only, that we only do alcohol testing. We retain them for six months, unless otherwise noted by a Court. And, if we do drug testing on a particular sample, we hold them for one year, unless otherwise noted by a Court. [139] Q Okay. Now, as it relates to the blood alcohol test, is all of the blood in the vials consumed in the analysis?

A No, it is not.

Q So, you retain the actual blood sample so you could retest it, or if someone else wants to test it, they can do it, too?

A Correct.

Q Okay. Does that happen?

A Yes.

Q Okay. Did it happen in this particular case?

A Not that I'm aware of.

Q Okay. So, what is the process? After you receive the two vials of blood, what do you do?

A If we can analyze them that very same day, we do, or else, we put them in a refrigerator until the next day for analysis.

Q Okay. Does that—does your document indicate the date that you received it?

A Yes, it does.

Q. What date did you receive it?

A It was received August the 16th, 2005.

Q Okay. And, when was the—when was the analysis done?

A The actual analysis was done August the 17th, 2005.

[140] Q Okay, now. Why is—so, this—you put it in a refrigerator?

A Uh-huh.

Q And, then, the next day you did the analysis?

A Correct.

Q Now, are we at that process now?

A We are.

Q Okay. Tell the jury what you—what your agency does—what you would—what you did regarding this specific sample.

A Well, we follow—we have a standard operating procedure. So, this happens with every sample.

MS. SUPLER: Objection. Again, to—

THE COURT: Overruled.

MS. SUPLER: —standard operating procedure.

BY MR. WAINWRIGHT: Just tell us what you did with this sample.

A We took this particular blood sample. We opened one of the vials. We took an aliquot, two aliquots [of small amounts]—two samples of the blood, two hundred microliters, so you're looking at point two mils, a very small amount that we use of the blood. We put it in a vial with an internal standard, which is used for the actual testing, as the identifying marks. We cap the sample in this particular vial, and put it on the instruments for [141] analysis.

Q Okay. Now, what—what instru—what type of vials are we putting it in?

A Little glass vials, about twenty mils.

Q Okay. And, how do you cap them?

A We have a Teflon septum, and, then, we crimp them with an aluminum top.

Q Okay. And, what machine do you place them in?

A We use a head space gas chromatograph with an auto sampler.

Q Okay. Now, in layman's terms, would you please tell the jury what that means?

A A gas chromatograph is an instrument—it's about the size of a microwave—and, what we're doing is, we're taking air space right above this particular sample, and shooting it into this microwave-size instrument. Within it, we have two columns. These particular columns have a sticky nature to them. As the compounds are traveling through them, being pushed by air, it'll latch on to a particular—it will allow a particular compound to go according to size. So, the smaller compounds come through first. Then, the bigger ones, and progressively. So, it's a timed type of procedure. And, on the other end of this column, within the gas chromatograph, we have the detectors, which actually detect the compounds, and the computer notifies us which [142] compounds those are.

Q Okay. And, does the machine itself indicate what the results are?

A Yes.

Q So, there's nothing that the human has to do, other than look at the machine and record the results?

A Correct.

Q Okay. And, were the results recorded on this particular document?

A Yes, they were.

Q And, can you tell the jury what the results were of this?

A The results were zero point two one grams of alcohol per one hundred milliliters of blood.

Q Okay. Now, you're aware of the implied consent law in the State of New Mexico. Is that correct?

A Yes, I am.

Q. And, you know what the—the presumptive intoxication level is in the State. Is that correct?

A Correct.

Q And, what is that?

A The per se level in our State is at point zero eight.

Q And, what is this again?

A The per se level.

[143] Q No. What was the results here?

A Oh. Point two one grams.

Q Okay. So, that mathematically would be more than twice the limit?

A Correct.

Q Okay. Now, what do you do after the test is completed, and you've eyeballed the machine and you've recorded the data?

A We record the data, as was brought out. After we record the data, all of our work gets reviewed by an independent person. A third person will review our work to make sure that the quality control nature that we have enacted is correct, that all those results are correct. And, that these particular samples—the results that we get for each sample—is within the limits that we have. Then, after the reviewers agreed with the work that we've produced, we actually fill out this particular form with the results. The reviewer signs the form, and, then, the results get mailed out.

Q Once the—once the material is prepared and placed in the machine, you don't need any particular expertise to record the results, do you?

A No.

Q I mean, any human being could look and write and just record the results?

[144] A Correct.

Q Or, the machine as with the Breathalyzer, can print out the results?

A Correct.

Q Does this particular machine print out the results, or is it an eyeball recorded?

A It prints out the results.

Q Okay. And, then, that is transposed from the printout of the machine to this document?

A Correct.

Q Now, do you have any expertise in the area of alcohol metabolism?

A Yes, I do.

Q And, my question is this.

MS. SUPLER: I'm going to object, Your Honor. I'm going to object—

THE COURT: (Inaudible)?

MS. SUPLER: I'd like to approach the bench on it.

THE COURT: Sure. [Come on up].

(Discussion at the bench.)
(In Open Court.)

BY MR. WAINWRIGHT: Sir, in your—in your area of expertise, is the blood—is the blood—is this machine more accurate than the intoxilyzer, than a breath test?

[145] A When you are dealing with alcohol samples, if you assume that the person is post-absorbtive, or

they're coming down, the difference is only five percent. So, you're looking at a difference in the third digit. So, they're accurate. They're both as equally accurate.

Q Okay. As far as your job is concerned.

A They're accurate.

Q And, can you tell us from the document when this blood was drawn?

A According to this document, the blood was drawn on August the 14th, 2005.

Q And, does it give a time?

A It states time of 1825.

Q Okay.

MR. WAINWRIGHT: Your Honor, I would move for the introduction of State's Exhibit 1.

MS. SUPLER: And, I've already explained it.

THE COURT: I think the objections have been made, and I will allow it. I will allow it.

MR. WAINWRIGHT: Your Honor, may I publish it to the jury?

THE COURT: You certainly may.

MR. WAINWRIGHT: Thank you, Your Honor. And, I pass the witness.

[146] CROSS-EXAMINATION OF GERASIMOS RAZATOS

BY MS. SUPLER:

Q Good afternoon.

MS. SUPLER: Your Honor, should I wait 'till the jurors are done, or do you want me to begin (inaudible) again.

THE COURT: Go ahead.

MS. SUPLER: Okay.

Q BY MS. SUPLER: Now, referring to State Exhibit Number 1, I have a copy in front of me, your signature doesn't appear anywhere on this exhibit. Correct?

A Correct.

Q You aren't Yvonne [Hudzinger] (phonetic), the person who indicates she received the sample from your lab. Correct?

A Correct.

Q And, you aren't the person that analyzed the sample, which would have been who?

A According to the form, it says Curtis Caylor.

Q Okay. And, Curtis Caylor was very recently put on unpaid leave. Correct?

A Correct.

Q And, you don't know the reason why, do you?

A No, ma'am.

Q And, you aren't the reviewer, Ruth—

[147] A Luthy.

Q Luthy.

A Luthy.

Q Luthy. You aren't that person?

A Correct.

Q So, you didn't observe Mr.—tell me the analyst's name again.

A Caylor.

Q Caylor. You didn't observe him conduct the analyst—analysis, did you?

A Correct.

Q Okay. And, you didn't review his analysis as the reviewer signed off on this document?

A Correct.

Q So, what you've told us today about procedures, it's the way you conduct an analysis. Correct?

A No. It's the way the laboratory conducts analysis.

Q Well, sir, it's the way you're taught by the laboratory to conduct an analysis, correct?

A Correct.

Q But, you don't know unless you actually observe the analysis that someone else conducts, whether they followed that protocol in every instance, do you, sir?

A Correct.

Q And, again, you don't know why he's been placed on [148] unpaid leave, do you?

A Correct.

MS. SUPLER: No further questions at this time.

THE COURT: State.

MR. WAINWRIGHT: I have nothing further of this witness at this time, Judge.

THE COURT: Okay. Can the witness step down?

MR. WAINWRIGHT: He can step down, Judge. He's subject to recall.

THE COURT: Subject to recall. Okay. Thank you very much, sir. You're excused. Oh, I'm sorry. Come on back up here. I have a question from a juror. I kind of know how you're going to answer it, so let me ask the question, and, then, let counsel—either counsel object if they so choose.

MS. SUPLER: Would the Court allow us to hear the question up at the bench, and address it that way?

THE COURT: No. How long can it take to reach an alcohol level of point two one?

MS. SUPLER: Your Honor—

THE COURT: Is there any objections to the question?

MS. SUPLER: Yes, Your Honor, based on our conversation at the bench, at this time, I don't think that there's been a foundation established.

THE COURT: Well, let me ask a question [first]. Is [149] there any answer that you can give to that, that would be definitive?

THE WITNESS: No.

THE COURT: Okay. I'm going to leave it at that. Okay. You may step down.

MR. WAINWRIGHT: State rests, Your Honor.

* * * *

[197] [CLOSING ARGUMENT BY MS. SUPLER]

[MS. SUPLER]: And, then, we come to the blood analysis. Now, as you've heard, Mr. Bullcoming is not disputing that he drank vodka, a lot of vodka, after he got out of that car. But, can you even trust the blood analysis that you've received? You didn't hear from the analysis—the analyst who did it, because he's been put on unpaid leave, and we don't know why. You heard from another man who came in here and said, "Here's what the results were." And, he told you about what the protocol is in his lab, but he told you he didn't witness this analysis. So, do we even know that his blood alcohol level was as high as point two one? There's no dispute. We're not denying that he was drunk at the time the blood was drawn. But, he wasn't at the time he got out of that truck. And, that's the only moment that matters at the point he was driving.

But, looking at that report, even the part filled out by Officer Rock was that the arrest time is 1700 hours, which we now know is 5:00pm. Almost forty-five minutes after when this accident occurred. Much more consistent with what Mr. Bullcoming told you as to the time.

And, the witness—the analyst who did testify—who didn't do this report, who didn't do the analysis, talked about how the test can be read by anyone, it prints out a result, he told you. And, then, that's printed onto this form. Well, you'll—you'll be able to see this form that's number one for the State. It doesn't have any printed out point two one. It has a handwritten-in point two one, presumably by the man who's on unpaid leave, and we don't know why he's on unpaid leave. Could it be because he wasn't following protocol in the lab? We won't know that. We don't know the answer.

SCIENTIFIC LABORATORY DIVISION
700 Camino de Salud, NE, P.O. Box 4700, Albuquerque, NM 87196-4700
Please type or print full information to avoid delay in report.

REPORT OF BLOOD ALCOHOL ANALYSIS

8-16-05 | 0830 | 800 501450
Date Received | Time Received | Lab No.

PART A-INFORMATION IN THIS BLOCK TO BE FILLED IN BY ARRESTING OFFICER

SEND LAB ANALYSIS REPORT TO:
Name: Farmington Police Dept.
(Complete name of your agency)
Address: 900 municipal
(Street or post office box number)
Farmington NM 87401
(City) (State) (Zip Code)

SEND COPY TO:
Donor's identification:
Name: Bullcoming Donald L
(Last) (First) (Middle)
Address: 2011 Troy King # 207
(Street or post office box number)
Farmington NM 87401
(City) (State) (Zip Code)
Sex: M Weight: 210 Date of Birth: 5-11
SSN: 441605813 Place of arrest: 30th / Farmington
Dr. Lic.#: 080582209 County: OK

ARRESTING OFFICER IDENTIFICATION:
Name: David Rock Date: 8-14-05
Department: FPD Arrest Time: 1700 ☐AM ☒PM
Blood drawn by: LACOATES, RN Date blood drawn: 8-14-05
Place drawn: SJRMC Time blood sample drawn: 1825 ☐AM ☒PM
Blood draw witnessed by: (Signature)
REMARKS: check for blood alcohol concentration
(Signature of arresting officer)

REASON SUSPECT STOPPED:
☐ Erratic Driving
☒ Accident ☐ Fatal ☐ Great Bodily Injury ☐ Other:
☐ Other:
Investigated or Witnessed by: Rock R643
(Signature)

INFORMATION BELOW IS TO BE FILLED IN BY DRAWER OF ANY BLOOD SAMPLE

I certify that on the date, time and place indicated above, I drew blood samples from the above named donor and that I marked and sealed the samples with the donor's name. The blood was collected using the entire contents of an SLD approved blood collection kit in accordance with the instructions.

LACOATES, RN Date 8-14-05 Title RN Employer Name SJRMC ER
(Signature of blood drawer)

PART B LABORATORY USE ONLY

CERTIFICATE OF RECEIVING EMPLOYEE

Specimen Blood ☒ ☐ Other: Received from:
Received from: Via Mail ☐ In Person ☐ Other ☐ Other Remarks:
Seal Intact: Yes ☒ No ☐ If No, explain:
I certify that on the date shown in the "date received" blank above, I received the sample which accompanied this report and followed the procedures set out on the reverse of this report, and the statements in this block are correct.
Yvonne Hautzinger
(Signature of receiving employee)

CERTIFICATE OF ANALYST

The seal of this sample was received intact and broken in the laboratory: Yes ☒ No ☐ If No, explain:
Blood sample: 21 Result of Analysis gms/100ml alcohol concentration in sample
Remarks:
I certify that I followed the procedures set out on the reverse of this report, and the statements in this block are correct. The concentration of alcohol in the sample is based on the grams of alcohol in one hundred milliliters of blood.
Date of analysis: 8/17/05
Analyzed by: Capt. Carpenter
(Signature of analyst)

STATE'S EXHIBIT 1
Sandra Bullcoming CR-05-393

CERTIFICATE OF REVIEWER

I certify that the analyst who conducted the analysis in this case meets the qualifications required by the director of this laboratory to properly conduct such analyses; the supervisor of analysis is also qualified to conduct such analyses; and that the established procedure has been followed in the handling and analysis of the sample in this case.
Date: 8/18/05 Reviewer: Matt Tuttle

CERTIFICATE OF MAILING

I certify that on this date I mailed a legible copy of this report to the donor, in accordance with the mailing procedure set out on the reverse of this report.
Date: 8-22-05 Laboratory Employee: Yvonne Hautzinger

SLD 705 (Rules of Procedure for the Mu[redacted] Rule 6-607; and Rules of Criminal Procedure for [illegible] Form 9 SLD 705 as amended, effective July 1, 1999 (rev. 10/04)

— Appendix D 31A —

PROCEDURE

1. The laboratory named on the front of this report is a laboratory authorized or certified by the Scientific Laboratory Division of the Health Department to perform blood and alcohol tests. The agency has established formal procedures for receipt, handling and testing of blood samples to assure integrity of the sample, a formal procedure for conduct and report of the chemical analysis of the samples by the gas chromatographic method (_____) *(specify, if other method used)* and quality control procedures to validate the analyses. The quality control procedures include semi-annual proficiency testing by an independent agency. The procedures have the general acceptance and approval of the scientific community, including the medical profession, and of the courts, as a means of assuring a chemical analysis of a blood sample that accurately discloses the concentration of alcohol in the blood. The same procedures are applicable for samples other than blood if submitted for alcohol analysis. The analyst who conducts the analysis in this must meet the qualification required by the director of this laboratory to properly conduct such analyses. The supervisor of analysts must also be qualified to conduct such analyses.

2. When a blood sample is received at the laboratory, the receiving employee examines the sample container and:

   (a) determines that it is a standard container of a kit approved by the director of the laboratory;

   (b) determines that the container is accompanied by this report, with Part A completed;

(c) determines that the donor's name and the date that the sample was taken have already been entered on this report and on the container and that they correspond;

(d) makes a log entry of the receipt of the sample and of any irregularity in the condition of the container or its seals;

(e) places a laboratory number and the date of receipt on the log, on the container, and on this report, so that each has the same laboratory number and date of receipt;

(f) completes and signs the Certificate of Receiving Employee, making specific notations as to any unusual circumstances, discrepancies, or irregularities in the condition or handling of the sample up to the time that the container and report are delivered to the analysis laboratory;

(g) personally places the container with this report attached in a designated secure cabinet for the analyst or delivers it to the analyst.

3. When the blood sample is received by the analyst, the analyst:

(a) makes sure the laboratory number on the container corresponds with the laboratory number on this report;

(b) makes sure the analysis is conducted on the sample which accompanied this report at the time the report was received by the analyst;

(c) conducts a chemical analysis of the sample and enters the results on this report;

(d) retains the sample container and the raw data from the analysis;

(e) completes and signs the Certificate of Analyst, noting any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis;

(f) delivers this report to the reviewer.

4. The reviewer checks the calculations of the analysis, examines this report, signs the Certificate of Reviewer, and delivers the report to a laboratory employee for distribution.

5. An employee of the agency mails a copy of this report to the donor at the address shown on this report, by depositing it in an outgoing mail container which is maintained in the usual and ordinary course of business of the laboratory. The employee signs the certificate of mailing to the donor, and mails the original of this report to the submitting law enforcement agency.

6. The biological sample will be retained by the testing laboratory for a period of at least six (6) months pursuant to regulations of the scientific laboratory division.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
NOV 30 2010
OFFICE OF THE CLERK

No. 09-10876

IN THE

Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

NEW MEXICO,

Respondent.

On Writ of Certiorari
to the New Mexico Supreme Court

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

BRIEF FOR THE PETITIONER 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISION 1

STATEMENT 2

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. If The Prosecution Introduces A Witness's Testimonial Statements, The Confrontation Clause Entitles The Defendant To Be Confronted With That Particular Witness 13

II. The New Mexico Supreme Court Erred By Refusing To Enforce The Particular-Witness Rule in This Case 22

A. The Confrontation Clause's Particular-Witness Rule Is Not Subject To An Exception Based On The Ability To Cross-Examine A Different Witness 23

B. Even If The Particular-Witness Rule Were Subject To An Exception Based On The Ability To Cross-Examine A Different Witness, Such An Exception Would Not Apply Here 26

1. There Is No Exception For Forensic Reports 26

2. There Is No Exception For Testimony Concerning Machine-Generated Results 33

CONCLUSION 37

TABLE OF AUTHORITIES

Cases

Broad. Music, Inc. v. Havana Madrid Rest. Corp., 175 F.2d 77 (2d Cir. 1949) 19

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California v. Trombetta, 467 U.S. 479 (1984) 27, 28

Coy v. Iowa, 487 U.S. 1012 (1988) 21

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Creamer v. Bivert, 113 S.W. 1118 (Mo. 1908) 19

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Dowdell v. United States, 221 U.S. 325 (1911) 16

Giles v. California, 128 S. Ct. 2678 (2008) 24

Government of the Virgin Islands v. Aquino, 378 F.2d 540 (3d Cir. 1967) 19

Maryland v. Craig, 497 U.S. 836 (1990) 15, 17

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United States v. Inadi, 475 U.S. 387 (1986) 17

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BRIEF FOR PETITIONER

Petitioner Donald Bullcoming respectfully requests that this Court reverse the judgment of the New Mexico Supreme Court.

OPINIONS BELOW

The order of the New Mexico Supreme Court (JA 1-27) is reported at 147 N.M. 487, 226 P.3d 1 (2010). The opinion of the New Mexico Court of Appeals (JA 28-42) is published at 144 N.M. 546, 189 P.3d 679 (Ct. App. 2008). The relevant trial court proceedings and order (JA 43-47, 50-51) are unpublished.

JURISDICTION

The judgment of the New Mexico Supreme Court was entered on February 12, 2010. Petitioner filed a timely petition for a writ of certiorari on May 12, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT

In the course of prosecuting and convicting petitioner Donald Bullcoming for driving while intoxicated (DWI), the State of New Mexico introduced a forensic report asserting that gas chromatograph testing had determined his blood alcohol level to have been .21 – a level that not only satisfied the State's DWI statute but that also qualified as aggravated DWI and subjected petitioner to an extended prison term. The State did not, however, present live testimony from the lab analyst who conducted the test and wrote the report. While petitioner's appeal was pending in the New Mexico Supreme Court, this Court held in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that authors of forensic reports are "witnesses" under the Sixth Amendment and "are therefore subject to confrontation." *Id.* at 2531-32, 2537 n.6. The New Mexico Supreme Court nonetheless rejected petitioner's Confrontation Clause claim and affirmed his conviction, holding that the State satisfied its confrontation obligations at petitioner's trial because it presented testimony from a *different* forensic analyst – one who had nothing to do with the test at issue here.

1. In August 2005, petitioner Donald Bullcoming accidentally rear-ended a pickup truck that was stopped at an intersection in Farmington, New Mexico. No one was injured, and the other vehicle sustained only minor damage. When the other driver exited his vehicle to exchange insurance information, he noticed that petitioner's eyes were bloodshot, and he thought that petitioner's breath smelled of alcohol.

The other driver instructed his wife to call the police and informed petitioner that the police were on their way. Petitioner then excused himself to the restroom and left the scene.

When the responding police officer arrived, petitioner was still absent. After a brief search, the officer found petitioner a short distance away. They returned to the scene in the officer's patrol car. Having noticed that petitioner appeared intoxicated, the officer asked him to perform a series of field sobriety tests, which he failed. Petitioner also declined to take a breath test. The officer arrested petitioner for DWI and took him to the police station for booking.

The officer then drove petitioner to a local hospital where a nurse drew his blood and sent the sample to the New Mexico Department of Health Scientific Laboratory Division for determination of petitioner's blood alcohol concentration (BAC). Under New Mexico law, a BAC of at least .08 is sufficient to prove DWI, N.M. Stat. § 6-8-102(C)(1), whereas a BAC of .16 or more constitutes aggravated DWI, *id.* § 6-8-102(D)(1).

2. New Mexico forensic laboratories analyze BAC levels using gas chromatograph machines, which require specialized knowledge and skill to operate. Under New Mexico's standard operating procedures for gas chromatograph testing, a forensic analyst is supposed to "open[] one of the [blood] vials," take "two samples of the blood" and put them in a "vial with an internal standard, which is used for the actual testing." JA 53. Next, the analyst is supposed to "cap the sample[s]" and "crimp them with an aluminum top." JA 53-54. The analyst then is

supposed to place the samples inside the gas chromatograph, in a receptacle with slots somewhat like a carousel for a slide projector. A single chromatograph can test over a dozen samples at a time.

The machine then analyzes the various samples and prints out the results on documents called chromatograms. Sometimes a chromatogram contains simply a line with peaks and valleys that the analyst must interpret, and sometimes it also contains a number indicating the sample's purported BAC. Although nothing in the record explains what chromatograms in the lab at issue here look like, the New Mexico Department of Health asserted in an amicus brief in the New Mexico Supreme Court (at page 6) that the chromatograms its machines produce contain both graphs and numbers. At any rate, even when a chromatogram contains both graphs and numbers, an analyst still must interpret the graph to determine whether a valid test occurred.

The analyst next must compare the results of both samples at issue – one of which supplies the "quantitative value" and the other of which serves as a control – to determine whether the reported concentrations are within 5% of each other. If the reported concentrations vary by more than 5%, then the samples must be reanalyzed. If not, then the analyst "transpose[s]" the quantitative value from the printout to a Department of Health "report of blood alcohol analysis." JA 56, 62. Finally, the lab mails the results to the police. The lab typically retains the unused part of the blood sample for at least six months so that the analyst or "someone else who wants to test it" can do so. JA 52.

3. Upon receiving petitioner's blood sample, a lab employee signed it in and stored it in a refrigerator. The next day, the lab assigned Curtis Caylor to test the sample's BAC. JA 53, 58.

On a Department of Health report of blood alcohol analysis, Caylor stated that he tested the sample. JA 62, 64. In a "block" on the report reserved for the forensic analyst he wrote that petitioner's blood sample contained an alcohol concentration of .21 grams per hundred milliliters. JA 62. He also declared that "[t]he seal of this sample was received intact and broken in the laboratory." JA 62. Caylor further "certifl[ied]" that he "followed the procedures set out on the reverse of this report, and the statements in [his] block [we]re correct." JA 62. The reverse of the report provides, among other things, that "[w]hen the blood sample is received by the analyst," the analyst:

- "makes sure the laboratory number on the container corresponds with the laboratory number" on the forensic report, JA 64;
- "makes sure the analysis is conducted on the sample which accompanied this report at the time the report was received," JA 64;
- "retains the sample container and the raw data from the analysis," JA 65; and
- notes "any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis," JA 65.

Other blocks in the forensic report contain signatures and certifications from others involved in the chain of custody and the testing. The police

officer who arrested petitioner certified that he had, in fact, arrested him and brought him to the hospital to initiate a BAC analysis. JA 62. The nurse who drew petitioner's blood certified to this effect. JA 62. The employee at the lab who received the delivery of petitioner's blood sample certified that she received it and logged it into the lab's system. JA 62. Finally, the analyst who reviewed Caylor's results certified that Caylor was qualified to conduct BAC analyses and that, as far as he knew, established procedures had been followed in this case. JA 62.

4. The State charged petitioner with DWI under N.M. Stat. § 6-8-102. JA 1. At trial, the State sought to introduce the forensic report (but not any of the underlying chromatograms) as part of its evidence. Of the five people who had signed the report, the State called two of them to testify: the arresting officer and the nurse who drew petitioner's blood. (Petitioner offered to stipulate to the latter's testimony, JA 16, but the State insisted on putting her on the stand.) Petitioner had no objection to allowing the written certifications from two of the others: the lab's intake employee and the reviewing analyst. That left Caylor, the analyst who actually tested petitioner's blood sample and asserted it had a BAC of .21, as the sole remaining witness respecting the report.

On the day of trial, the State informed petitioner that it intended to call Gerasimos Razatos, another analyst with the Department of Health, to testify in lieu of Caylor. JA 46. The State did not claim that Caylor was unavailable to come to court or that there was any other reason why it was seeking to call Razatos instead of him. Nor could the State claim

that Razatos had any personal connection to the testing Caylor claimed to have done; Razatos neither supervised nor reviewed Caylor's work. Instead, the State sought to use Razatos simply as a conduit for introducing Caylor's assertions in the forensic report.

Petitioner objected that allowing the State to call Razatos in place of Caylor would violate his rights under the Confrontation Clause. JA 44.[1] As explicated in *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause forbids the prosecution from introducing a witness's out-of-court testimonial statements unless that witness testifies at trial – or unless the witness is unavailable and the defense has had a prior opportunity for cross-examination, *id.* at 59, neither of which was the case here. The trial court, however, overruled the objection. JA 45. It reasoned that admission of the forensic report was not "prohibited by *Crawford*" because the report was not testimonial. JA 45. It then admitted the forensic report into evidence "as a business record," JA 45, and allowed Razatos to testify based on its contents.

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[1] This day-of-trial objection was timely because it was the first time petitioner learned that the State intended to introduce Caylor's report without presenting live testimony from him. Unlike many states, New Mexico does not have a "notice and demand" regime. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009) (approving of notice and demand systems "requir[ing] the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial").

On direct examination, Razatos described the lab's "standard operating procedure" for gas chromatograph testing, JA 53, and stated that "[t]he results [of the test in this case] were zero point two one grams of alcohol per one hundred milliliters of blood." JA 55. On cross-examination, Razatos acknowledged that he had not "observe[d] [Caylor] conduct the analysis" or "review[ed] his analysis" in the lab. JA 58. He also conceded that "you don't know unless you actually observe the analysis that someone else conducts, whether they followed the protocol in every instance." JA 59. Finally, Razatos acknowledged that Caylor, the analyst who had actually tested petitioner's blood sample, "was very recently put on unpaid leave." JA 58. When defense counsel asked Razatos why the State had placed Caylor on unpaid leave, he replied that he did not know. JA 58.

In his closing argument, the prosecutor relied on Caylor's assertions in the forensic report, noting that petitioner was "still registering a point two one blood alcohol in his system" approximately two hours after he was arrested. Tr. 190 (Nov. 16, 2005). The jury found petitioner guilty, and the trial court ultimately entered a judgment convicting him of aggravated DWI. Petitioner was sentenced to two years in prison.

5. The New Mexico Court of Appeals affirmed. JA 29. As is relevant here, the appeals court rejected petitioner's Confrontation Clause argument on the ground that "the blood alcohol report in the present case was non-testimonial and prepared routinely with guarantees of trustworthiness." JA 38.

6. The New Mexico Supreme Court granted review. While the case was pending, this Court held in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that forensic reports are "testimonial statements" inasmuch as analysts who create such reports are "witnesses" for purposes of the Sixth Amendment. *Id.* at 2532.

In light of that decision, the New Mexico Supreme Court acknowledged that Caylor's forensic report in petitioner's case constituted testimonial evidence. JA 12. Yet the New Mexico Supreme Court refused to hold that the report's admission violated the Confrontation Clause, reasoning that Razatos's in-court testimony gave petitioner "the opportunity to meaningfully cross-examine a qualified witness regarding the substance of [Caylor's report]." JA 16. In particular, the New Mexico Supreme Court opined that when forensic evidence is at issue, "live, in-court testimony of a separate qualified analyst" – even one, as here, who has no personal knowledge of, or connection to, the testing that was supposedly done – "is sufficient to fulfill a defendant's right to confrontation" because such an analyst can answer general questions about how the lab operates. JA 14. Second, the court asserted that Caylor had "simply transcribed the results generated by the gas chromatograph machine." JA 13. Thus, according to the court, Caylor's statements, in contrast to those at issue in *Melendez-Diaz*, did not "present[] a risk of error that might be explored on cross-examination." JA 13 (quoting *Melendez-Diaz*, 129 S. Ct. at 2537-38).

7. This Court granted certiorari. 131 S. Ct. 62 (2010).

SUMMARY OF ARGUMENT

The State violated the Confrontation Clause by introducing one analyst's testimonial statements in a forensic report through the testimony of a different analyst who did not perform or observe any of the laboratory tasks or analysis described in the statements.

I. The foundational rule of the Confrontation Clause – which has been established for centuries and applies across every kind of testimony – is that if the prosecution wishes to introduce a witness's testimonial statements, then the defendant is entitled to be confronted with *that particular witness*. Confrontation of a particular witness serves four primary purposes: (1) it enables cross-examination concerning the witness's factual assertions, his believability, and his character; (2) it guarantees that the witness gives his testimony under oath; (3) it allows the trier of fact to observe the witness's demeanor; and (4) it ensures that the witness testifies in the presence of the defendant. Confrontation with what might be called a "surrogate witness" thwarts all four of these objectives.

II. There is no good reason why the Confrontation Clause's particular-witness rule should not apply here.

A. There is no exception to the particular-witness rule based on the defendant's ability to cross-examine a different witness. Cross-examination is only one of the four components of confrontation, and even full cross-examination cannot justify dispensing with the other three components when it is possible to effectuate them. But even with respect to cross-

examination, the text and history of the Confrontation Clause make clear that it is not for a court to say – as the New Mexico Supreme Court asserted here, JA 16 – that questioning one witness regarding the substance of another's testimonial statements provides a "meaningful[]" enough opportunity for cross-examination. Once someone is a "witness" under the Confrontation Clause (as Caylor was here), the Clause imposes a categorical requirement that the defendant be confronted with *that witness*. No further constitutional analysis is necessary or permissible.

B. Even if the particular-witness rule were subject to an exception based on the defendant's ability to cross-examine a different witness, no such exception would apply here.

1. There is no "forensic evidence" exception to the Confrontation Clause's bar against surrogate testimony. When this Court held two Terms ago in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that forensic reports are testimonial, it explained that the prosecution there had violated the Confrontation Clause not simply because it had introduced forensic reports without putting *an* analyst on the stand but rather because "[t]he analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation . . . ." *Id.* at 2537 n.6 (emphasis added); *accord id.* at 2532. This holding makes perfect sense. Forensic analysts – just like other witnesses – sometimes give erroneous information to law enforcement due to carelessness, poor judgment, pressure from police, or outright fabrication. Confrontation with the analyst whose

report is introduced into evidence guards against these possibilities and enables the defendant to probe at trial whether any of them occurred in his case. Surrogate testimony, by contrast, stymies this adversarial process and can even allow the prosecution to shield potentially damning information from the trier of fact – as occurred in this very case when the State's surrogate witness revealed on cross-examination that the analyst who wrote the forensic report at issue "was very recently put on unpaid leave" but was unable to say why this had occurred. JA 58.

2. Nor is there an exception to the bar against surrogate testimony for testimony that supposedly reports machine-generated results. Almost all witnesses testify regarding things that they claim to have observed. Reporting numbers from a machine print-out is thus no different, for example, than claiming to have seen a certain license plate number, an address on an apartment, a phone number that came up on a caller ID, or indeed any objective physical item. In all of these instances, confrontation of the actual witness whose testimonial statements the prosecution seeks to introduce – with the witness under oath and in the presence of the jury and the defendant – allows the defendant to test whether the witness really observed what he claims to have observed, or whether the witness manipulated objects in a manner that caused the observations he reported to be misleading.

In any event, the analyst's testimonial statements in the forensic report here went far beyond purporting merely to transcribe machine-generated results. The analyst also "certified" that

petitioner's blood sample had not been contaminated and that he had followed various protocols in testing it. Those statements required confrontation with the analyst instead of a surrogate even under the New Mexico Supreme Court's erroneous conception of the Confrontation Clause.

ARGUMENT

I. If The Prosecution Introduces A Witness's Testimonial Statements, The Confrontation Clause Entitles The Defendant To Be Confronted With That Particular Witness.

A. The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The point of this provision is to regulate "the manner in which [the prosecution's] witnesses give testimony in criminal trials." *Crawford v. Washington*, 541 U.S. 36, 43 (2004). Specifically, the Clause requires the prosecution to follow the common-law method of "open examination of witnesses *viva voce*" at trial. 3 William Blackstone, Commentaries on the Laws of England *373 (1768). Put in modern terms, the Clause requires the prosecution to present "live testimony" from its witnesses "in court subject to adversarial testing." *Crawford*, 541 U.S. at 43. And in order to enforce that rule, the Clause forbids the prosecution from presenting "[t]estimonial statements of witnesses absent from trial" unless "the declarant is unavailable" and the core requirement of confrontation has already been satisfied – that is,

"the defendant has had a prior opportunity to cross-examine." *Id.* at 59; *accord id.* at 54, 68.

The use of the definite article in the text of the Sixth Amendment ("*the* witnesses") and in *Crawford*'s exclusionary rule ("*the* declarant") is not adventitious. Instead, as this Court has observed with respect to other legal provisions, the definite article "indicates that there is generally only one proper" person or object to which the law refers. *Padilla v. Rumsfeld*, 542 U.S. 426, 434 (2004); *see also Rapanos v. United States*, 547 U.S. 715, 732 (2006). In the context of confrontation, the word "the" dictates that if the prosecution decides to introduce testimonial evidence, it must afford the defendant the opportunity to be confronted with *the particular creator of that evidence* -- that is, the person who actually made the statement or authored the document at issue.

Any other rule would contravene the history and purpose of the right to confrontation. As Sir Matthew Hale explained roughly three centuries ago, the "Opportunity of confronting the adverse Witnesses" arises from the "*personal Appearance* and Testimony of Witnesses." Matthew Hale, The History of the Common Law of England 258 (1713) (emphasis added). This Court echoed this sentiment in one of its earliest confrontation opinions, making clear that confrontation entails a "personal examination" of "the witness," "subjecting him to the ordeal of cross-examination." *Mattox v. United States*, 156 U.S. 237, 242, 244 (1895). Subjecting *someone else* to cross-examination obviously is not a substitute for such "personal" questioning. After all, even Sir Walter Raleigh, whose "notorious" trial in

1603 served as a rallying cry for the right to confrontation, *Crawford*, 541 U.S. at 44, was "perfectly free to confront those who read Cobham's confession in court," *id.* at 51.

B. In light of this text, history, and constitutional purpose, this Court has repeatedly held that the prosecution violates the Confrontation Clause when it introduces a witness's testimonial statements through the in-court testimony of a different person. *See Davis v. Washington*, 547 U.S. 813, 826 (2006) (finding violation because "a note-taking policeman recite[d] the unsworn hearsay testimony of the declarant") (emphasis omitted); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2546 (2009) (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second."); *Crawford*, 541 U.S. at 68 (finding violation because "the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine *her*") (emphasis added).

Presenting a nontestifying witness's testimonial statements through the in-court testimony of what might be called a "surrogate witness" thwarts all four "elements of confrontation" that this Court has identified: (a) "cross-examination"; (b) the giving of testimony under oath; (c) "observation of [the declarant's] demeanor by the trier of fact;" and (d) "physical presence" of the defendant during the witness's testimony. *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

1. *Cross-examination.* Cross-examination, as this Court has often observed, is the "greatest legal

engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks and citation omitted). This procedure enables the defendant to test the prosecution's witnesses in four ways, none of which is possible if a surrogate testifies in place of a declarant.

First, cross-examination allows the defendant to "test the recollection of the witness," *Dowdell v. United States*, 221 U.S. 325, 330 (1911), and to inquire into the circumstances under which he made any prior recorded recollections that are introduced into evidence. It obviously is impossible to test the recollection of a declarant by questioning a surrogate witness. One person cannot access the memory of someone else.

Second, cross-examination promotes truthful testimony. At trial, cross-examination allows the defendant to "sift[] the conscience of the witness" testifying against him, to expose any lies or misleading statements. *Mattox*, 156 U.S. at 242. And even before trial, the prospect of facing cross-examination deters witnesses from making false testimonial statements in the first place. Sifting the conscience of a surrogate witness, however, is a futile act. A surrogate witness typically lacks personal knowledge regarding a declarant's out-of-court assertions, and thus cannot know whether the assertions are true. Furthermore, the deterrent effect of cross-examination would disappear if surrogates could testify in place of declarants, for declarants would be relieved of the prospect of having to defend their assertions under questioning in court.

Third, when a witness has made prior statements that the prosecution wishes to introduce

into evidence, cross-examination allows the defendant to "force the declarant to clarify ambiguous phrases and coded references," as well as any "inconsisten[cies]" between the statements and the witness's in-court testimony. *United States v. Inadi*, 475 U.S. 387, 407 (1986) (Marshall, J., dissenting). Such questioning, in turn, sometimes allows the witness to "correct and explain his meaning, if misunderstood," 3 Blackstone, Commentaries, at *373, or it can also reveal accidental exaggerations or intentional distortions. Once again, this iterative process would be frustrated by surrogate testimony. It is often very difficult for one person to decipher or to explain what someone else meant in making prior statements.

Fourth, cross-examination enables a defendant to attack the credibility of a witness by probing areas such as his personal history, experience, sensory perceptions, and motives. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974). Such information and characteristics are personal – sometimes deeply personal – in nature. Accordingly, a defendant is typically unable to elicit them from someone other than the declarant. A surrogate witness, for instance, is unlikely to have personal knowledge of exactly why someone was fired from a previous job or whether someone has a history of substance abuse.

2. *The oath.* The Confrontation Clause also requires witnesses to provide their testimony under oath, "impressing [them] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury." *Craig*, 497 U.S. at 845-46. Indeed, from its very inception, the right to confrontation has banned the prosecution from

presenting testimony absent "the Solemnities of an Oath." Geoffrey Gilbert, The Law of Evidence 152 (1756); *see also* 2 William Hawkins, A Treatise of the Pleas of the Crown 434 (1721) ("Evidence for the King must in all Cases be upon Oath."); *Raleigh's Case*, 2 How. St. Tr. 1, 16 (1603) (Raleigh complaining that Cobham never "avouched" his accusation). This Court, therefore, has made clear that as offensive as "trial by sworn *ex parte* affidavit" may be to the Confrontation Clause, a system of "trial by *unsworn ex parte* affidavit" would be even worse. *Crawford*, 541 U.S. at 52-53 n.3; *accord Davis*, 547 U.S. at 826.

Introducing out-of-court testimonial statements through surrogate witnesses would enable just such a system. A witness could provide the prosecution with unsworn testimonial statements before trial and avoid ever having to swear to their truth. The witness would also avoid a possible prosecution for perjury if the prosecution later found out that he had lied.

3. *The jury's observation of the witness.* The process of confrontation further ensures that the jury has the opportunity to "observ[e] the quality, age, education, understanding, behaviour, and inclinations of the witness," 3 Blackstone, Commentaries at *373-74, and to "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox*, 156 U.S. at 242-43. As courts have recognized across a variety of settings, "[t]he liar's story may seem uncontradicted to one who merely reads it, yet it may be contradicted . . . by his manner . . . which cold print does not preserve." *Broad. Music, Inc. v. Havana Madrid Rest. Corp.*, 175 F.2d

77, 80 (2d Cir. 1949) (internal quotation marks omitted). In particular, when a witness testifies before the jury:

> To [the trier of fact] appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by [the trier of fact].

Creamer v. Bivert, 113 S.W. 1118, 1120 (Mo. 1908); *see also United States v. Yida*, 498 F.3d 945, 950 (9th Cir. 2007) ("Live testimony gives the jury (or other trier of fact) the opportunity to observe the demeanor of the witness while testifying."); *Government of the Virgin Islands v. Aquino*, 378 F.2d 540, 548 (3d Cir. 1967) (a witness's live testimony may provide "innumerable telltale indications" that are more reliable indicators of falsity than the "literal meaning of his words"); Hale, The History and Analysis of the Common Law of England 257-58 (1713) ("[T]he very Manner of a Witness's delivering his Testimony will give a probable Indication whether he speaks truly or falsely.").

Calling a different person to the stand to relay a declarant's testimonial statements deprives the jury of the ability to observe the declarant. Indeed, allowing a surrogate to testify in place of a declarant could allow the prosecution to actually mislead the

jury, insofar as the jury may impute the surrogate witness's believability to that of the declarant. This, in turn, could create a prosecutorial incentive to call so-called "professional witnesses" – eloquent and polished performers – to court instead of real ones.

The everyday occurrence of police reports illustrates the concern. When a homicide detective visits a crime scene, he writes a report memorializing his investigatory observations. Such reports are written according to established office procedures, and one assumes that they are usually accurate. Indeed, within a report, an officer might record several objective and seemingly incontrovertible facts, such as the presence of blood spatter on the wall, broken furniture in the kitchen, or an open window in the bathroom. Nevertheless, the Confrontation Clause does not permit one officer to take the stand and relay another's purported observations of objective facts in a police report. Such surrogate testimony would not only deprive the defendant of the opportunity to cross-examine the officer who wrote the report about the various assertions therein, but it also would deprive the jury of the ability to observe that officer's "attitude," "demeanor," and "competence," which prosecutors have acknowledged that juries sometimes find more revealing than anything else. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. Rev. 1, 63-64 & n.254 (2002).

4. *Testifying face-to-face with the defendant.* Finally, confrontation traditionally guarantees a "face-to-face encounter between witness and accused." *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

As this Court has observed, there is "something deep in human nature" – as well as our legal history – "that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial.'" *Id.* (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)). A face-to-face encounter with a defendant facing the prospect of years in prison (or even death) helps ensure that the witness fully realizes the import of his testimony. Moreover, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Coy*, 487 U.S. at 1019. A witness testifying in court, of course, need not look at the defendant, but if he chooses not to, "the trier of fact will draw its own conclusions." *Id.*

The presence of a surrogate witness fails to create a face-to-face encounter between the defendant and the declarant. Accordingly, it deprives the defendant of the opportunity of having someone who lied or was careless in making prior testimonial statements face the full import of his words.

Imagine, for example, that a man looking out his family room window observes an altercation between two neighbors. The man's wife is in the next room but does not see the fight. The man knows that one of the neighbors is particularly aggressive, but he does not see who actually started the fight. When the police question the husband and wife the following day, the man asserts (in testimonial statements) that he believes that the aggressive neighbor started the fight by throwing the first punch, but he does not clarify that his statement is based on an assumption rather than his own observation. If the prosecution wants to use those testimonial statements at trial, the Confrontation Clause prohibits it from calling the

wife to testify in place of her husband. As a surrogate witness, the wife could recount the circumstances under which her husband witnessed the event, and she could also respond to a good number of questions about his character, sensory abilities, and personal history. But having the wife testify would be no substitute for requiring the husband to give his testimony in the presence of his neighbor. Confronted in this way with the grave consequences of his testimony, the husband might think about his observations more carefully and admit that he did not actually see who threw the first punch.

II. The New Mexico Supreme Court Erred By Refusing To Enforce The Particular-Witness Rule In This Case.

The New Mexico Supreme Court acknowledged that the Confrontation Clause generally prohibits the prosecution from introducing out-of-court testimonial statements "unless *the declarant* is unavailable to testify, and the defendant had had a prior opportunity for cross-examination." JA 7-8 (emphasis added) (internal quotation marks and citation omitted). The court also recognized that the statements at issue here – assertions in a forensic report – were testimonial because they were created for the purpose of proving a fact in a criminal prosecution. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009). JA 12. Finally, there is no evidence that the forensic analyst who wrote the report, Caylor, was unavailable to testify or that petitioner had ever had any prior opportunity to cross-examine him. The New Mexico Supreme Court

nevertheless held that petitioner's "right of confrontation was preserved" because he "had the opportunity to meaningfully cross-examine a qualified witness [Razatos] regarding the substance" of Caylor's testimonial statements. JA 16.

This reasoning is unsound for two reasons. First, the Confrontation Clause's bar against surrogate testimony applies regardless of whether a court believes that a defendant's opportunity to question the surrogate about the nontestifying witness's testimonial statements provides a meaningful opportunity for cross-examination. Second, even if the Confrontation Clause's ban on surrogate testimony were subject to such an exception, it would not apply in this case.

A. The Confrontation Clause's Particular-Witness Rule Is Not Subject To An Exception Based On The Ability To Cross-Examine A Different Witness.

There is no exception to the Confrontation Clause's prohibition against surrogate testimony for cases in which a court believes that a defendant's ability to question a testifying witness about a nontestifying witness's testimonial statements provides a meaningful opportunity for cross-examination. Cross-examination is only one of the four elements of confrontation. Thus, even if the New Mexico Supreme Court were correct that questioning one witness with respect to another declarant's testimonial statements could satisfy the right to cross-examination, it still would not satisfy the Confrontation Clause where nothing in the record suggests that it would have been impossible to have

the declarant testify under oath, in the presence of the jury, and face-to-face with the defendant.

More fundamentally, as this Court has noted, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Crawford*, 541 U.S. at 54. Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Giles v. California*, 128 S. Ct. 2678, 2692 (2008). Accordingly, just as the Confrontation Clause does not tolerate "[d]ispensing with confrontation because" a court believes that "testimony is obviously reliable," *Crawford*, 541 U.S. at 62, the Clause does not tolerate dispensing with confrontation because a court believes that questioning one witness about another's testimonial statements provides a fair opportunity for cross-examination. "[T]he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'" *Giles*, 128 S. Ct. at 2692.

Indeed, this Court has recently rejected the New Mexico Supreme Court's mode of reasoning not only in the context of the Confrontation Clause but also with respect to the Sixth Amendment right to counsel. In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), the Government argued that illegitimately denying a defendant his counsel of choice did not violate the Sixth Amendment so long as "substitute counsel's performance" did not demonstrably prejudice the defendant in some way. *Id.* at 144-45. Expressly analogizing to the *Crawford*

line of cases, *id.* at 145-46, this Court rejected that argument. "It is true enough," this Court explained, "that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Id.* at 145. If a "particular guarantee" of the Sixth Amendment is violated, no substitute procedure can cure the violation, and "[n]o additional showing of prejudice is required to make the violation 'complete.'" *Id.* at 146 (footnote omitted).

The same is true here. Just as substitute counsel cannot satisfy the Sixth Amendment, neither can confrontation of a substitute witness.

To the extent the State wished Razatos, instead of Caylor, to be the forensic analyst whom it presented at trial for purposes of proving petitioner's BAC, it had the option of using him while complying with the Confrontation Clause. All the State had to do was have Razatos retest the part of petitioner's blood sample that the lab had retained. *See* JA 65. But when the State elected instead to introduce Caylor's report, Caylor became a "witness" against petitioner under the Confrontation Clause. And when the State refused to put Caylor on the stand, it violated the Confrontation Clause's basic requirement of live testimony. That should be the end of the matter.

B. Even If The Particular-Witness Rule Were Subject To An Exception Based On The Ability To Cross-Examine A Different Witness, Such An Exception Would Not Apply Here.

Even if the Confrontation Clause's prohibition against surrogate testimony were not absolute, there would be no grounds for creating an exception to the rule here. The New Mexico Supreme Court held that the surrogate testimony of Razatos satisfied the Confrontation Clause for two supposed reasons: (1) a defendant can accomplish as much by cross-examining any "qualified analyst" as he can get out of questioning the particular analyst who wrote the forensic report that the State seeks to introduce; and (2) the testimonial statements in the report here merely "transcribed" machine-generated results, requiring no "independent judgment." JA 13-14. Neither contention withstands scrutiny.

1. There Is No Exception For Forensic Reports.

This Court's precedent, as well as good sense, dictates that there is no "forensic evidence" exception to the Confrontation Clause's bar against surrogate testimony.

a. This Court's decisions make clear that the Confrontation Clause's prohibition against introducing a nontestifying witness's testimonial statements through the in-court testimony of another applies fully in the context of forensic evidence. In the course of holding in *Melendez-Diaz* that forensic reports are testimonial, this Court repeatedly stated that, if the defendant objects, "the analyst who

provide[d] [the] results" must testify. 129 S. Ct. at 2537; *see also id.* at 2532 n.1 ("what testimony *is* introduced must (if the defendant objects) be introduced live") (emphasis in original); *id.* at 2531 (a "witness's testimony against a defendant is . . . inadmissible unless *the witness* appears at trial or, if *the witness* is unavailable, the defendant had a prior opportunity for cross-examination") (emphasis added). Accordingly, the Court did not simply hold that the Commonwealth of Massachusetts violated the Confrontation Clause by failing to present *a* witness along with its forensic report. It held, instead, that "[t]he analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation." *Id.* at 2537 n.6 (emphasis added); *see also id.* at 2532 ("petitioner was entitled to 'be confronted with' *the analysts* at trial") (emphasis added).

The dissent in *Melendez-Diaz* recognized as much. Summarizing the import of the majority's holding, the dissent explained that, at the very least, "the . . . analyst who must testify is the person who signed the certificate." *Id.* at 2545 (Kennedy, J., dissenting). The dissent added that "[i]f the signatory is restating the testimonial statements of the true analysts – whoever they might be – then those analysts, too, must testify in person." *Id.* at 2546 (Kennedy, J., dissenting).

Indeed, long before *Crawford* and *Melendez-Diaz* were decided, this Court observed in *California v. Trombetta*, 467 U.S. 479 (1984), that when the prosecution introduces a police officer's report of breathalyzer results, the defendant has the right to confront "*the law enforcement officer who*

administered the Intoxilizer test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered." *Id.* at 490 (emphasis added). Having a different police officer in court to explain how Intoxilizer tests are *typically* administered would not allow a defendant to probe "whether the test [in his case] was properly administered." *Id.*

b. Even if this Court's precedent did not resolve the issue, it would contravene good sense to create a "forensic evidence" exception to the Confrontation Clause's ban on surrogate testimony.

i. As this Court noted in *Melendez-Diaz*, forensic reports face the same "risk of manipulation" and error, 129 S. Ct. at 2536, as other *ex parte* testimony. Furthermore, "[a] forensic analyst responding to a request from a law enforcement official may," like other witnesses, "feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Id.* at 2536. An analyst could also simply be careless or hurried while preparing a sample for testing; programming or setting up a machine; checking controls; or checking a machine's calculations against accompanying graphs. These are no small matters: According to one source, 93% of errors in laboratory tests for BAC levels are human errors that occur either before or after machines actually analyze samples. *See* Donald J. Bartell et al., Attacking and Defending Drunk Driving Tests § 16:80 (2007).

The only person whom a defendant can question effectively respecting these issues is the actual analyst who wrote the report that is introduced against him. In fact, a well-represented defendant

may have numerous questions to ask an analyst about the work he purportedly did in coming to his conclusions. *See* Amicus Br. of NACDL. A surrogate witness who lacks personal knowledge regarding whether the analyst skipped or botched important steps in the forensic process stymies all of these inquiries. Indeed, in this very case, the State's surrogate witness, Razatos, acknowledged that he had not "observe[d] [Caylor] conduct the analysis" or "review[ed] his analysis" in the lab. JA 58. He also conceded that "you don't know unless you actually observe the analysis that someone else conducts, whether they followed the protocol in every instance." JA 59.

It is equally imperative that defendants have the right to confront particular analysts whose reports prosecutors introduce against them in order to root out whether those reports are deliberately false. Investigative boards, journalists, and independent organizations have documented numerous recent instances of fraud and dishonesty in our nation's forensic laboratories. *Melendez-Diaz*, 129 S. Ct. at 2536-38; *see also* Amicus Br. of Innocence Network. "While it is true," as this Court observed, "that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst." *Melendez-Diaz*, 129 S. Ct. at 2536 (internal citation omitted). Furthermore, "[l]ike the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony." *Id.* at 2537. This cannot happen with a surrogate on the stand, since a surrogate who lacks personal knowledge of the

analyst's actions cannot know for sure whether the analyst is simply lying.

ii. Even if the analyst who wrote the report does not remember conducting the particular test, an opportunity to confront and cross-examine that analyst – as opposed to someone else – is still vital.[2] As an initial matter, confrontation of the analyst who wrote the report requires that analyst to swear under oath to the accuracy of his purported findings and his other representations regarding the purity of the sample and the various testing procedures he employed – something the State itself emphasizes the analyst here never did. JA 12; Br. in Opp. 17, 24. In addition, as this Court observed in *Melendez-Diaz*, an analyst's results may be affected by a "lack of proper training or deficiency in judgment," *id.* at 2537, or by placing undue analytical weight on a suspect methodology, *id.* at 2538. Cross-examination in the presence of the jury and the defendant thus allows the defendant to "test[]" the analyst's "proficiency" regarding the scientific procedures he claims to have employed. *Id.* at 2538.

All of this is impossible to do with a surrogate witness. A surrogate may not know anything about the analyst who wrote the report. Even if he does, the surrogate would likely be unable to speak from

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[2] Because Caylor did not testify, we do not know whether he would have remembered performing the forensic test at issue here. But he may well have remembered the test, for it is relatively rare for blood tests to be performed in the part of the State where this case arose. Almost all DWI cases in that region are prosecuted by means of breathalyzer results.

personal knowledge about the analyst's training, skill, or attention to detail – or to demonstrate the analyst's professionalism or knowledge of laboratory procedures. And the jury would be unable to observe the analyst in order to gauge those attributes for itself.

This very case illustrates the importance of having live testimony from the analyst who wrote the report in order to probe his credibility. At petitioner's trial, the surrogate witness admitted on cross-examination that the actual analyst did not testify because the State had "very recently put [him] on unpaid leave." JA 58. When petitioner's attorney asked the surrogate why the actual analyst was placed on unpaid leave, the surrogate replied that he did not know. JA 58. This lack of personal knowledge prevented petitioner from discovering whether the analyst who purportedly determined that his BAC was over legal limits had been disciplined for erroneous or fraudulent work. It also prevented the jury from evaluating the actual analyst's integrity, which could have influenced its assessment of the accuracy of his forensic report.

A recent case from California underscores the point. In *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App.), *rev. granted* (Cal. 2009), the prosecution introduced an autopsy report to prove a hotly contested issue at trial – that a certain amount of time had elapsed before the victim's death. The medical examiner who had authored the report, however, did not testify at trial because he had been blacklisted from testifying in several California counties, including the county where the trial took place. *Id.* at 704. The examiner had also falsified his

credentials, performed incompetent work, and been fired and forced to resign "under a cloud" in other California counties. *Id.* at 714. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995); Scott Smith, S.J. Pathologist Under Fire Over Questionable Past, *The Record*, Jan. 7, 2007, *available at* http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070107/A_NEWS/701070311.

In light of this problematic track record, the prosecution decided to put the medical examiner's supervisor on the stand instead of the examiner. As the supervisor explained during the preliminary hearing, "[t]he only reason they won't use [the examiner himself] is because the law requires the District Attorney to provide this background information to each defense attorney for each case, and [the prosecutors] feel it becomes too awkward to make them easily try their cases." *Dungo*, 98 Cal. Rptr. 3d at 708. The California Court of Appeal held that this surrogate testimony violated the Confrontation Clause, observing that the "prosecution's intent" in failing to call the actual medical examiner had been to "prevent[] the defense from exploring the possibility that [he] lacked proper training or had poor judgment or from testing [his] 'honesty, proficiency, and methodology.'" *Id.* at 714 (quoting *Melendez-Diaz*, 129 S. Ct. at 2538). If the State of New Mexico were to prevail in this case, however, such underhanded prosecutorial tactics would be perfectly permissible.

2. There Is No Exception For Testimony Concerning Machine-Generated Results.

For two independent reasons, this Court should also reject the New Mexico Supreme Court's suggestion that surrogate testimony was acceptable here because Caylor, the analyst who performed the forensic test and wrote the report, "simply transcribed the results generated by the gas chromatograph machine." JA 13. First, the ordinary rules of confrontation apply even when a witness's testimonial statements purport simply to transcribe data. Second, the declarations in Caylor's forensic report went far beyond mere transcriptions.

a. The ordinary rules of confrontation apply when a witness's testimonial statements purport to do nothing more than write down a number that was displayed on the screen of (or on a piece of paper generated by) a machine.

Almost all witnesses testify about something that they claim to have observed. For example, a witness may claim that he observed a particular phone number on a caller ID, saw a certain color car speeding down his street, or saw a specific person commit a crime. Yet any of these claims – like a witness's claim that a machine generated certain numbers – is only as strong as the word of the witness. If the machine did not actually display the purported numbers, then the witness's statement is false. The New Mexico Supreme Court, however, utterly ignored that possibility, assuming instead from the forensic report that the machine actually displayed what Caylor claimed it did. JA 13. That is

the very fact that the defendant may be most likely to want to challenge on cross-examination.

Even apart from testing a witness's truthfulness, there may be other reasons to doubt the accuracy of a transcription. A witness might transpose numbers[3]; he might write down data connected to a different piece of evidence; or he might have a history of carelessness or malfeasance. A defendant can explore these matters related to a witness's "proficiency" only by questioning the actual declarant. *Melendez-Diaz*, 129 S. Ct. at 2538. A surrogate witness cannot respond to such inquiries – especially when, as here, the prosecution declined to introduce print-outs that the witness supposedly transcribed.

If witnesses who report numbers or other objective data were exempted from the ordinary rules of confrontation, the ramifications would extend far beyond the context of forensic evidence. Under the New Mexico Supreme Court's reasoning, for example, if a witness recorded the license plate number of a getaway car or the time on a digital clock after the commission of a crime and then gave the piece of paper to the police, a prosecutor wanting to introduce the witness's testimonial statements could introduce them through a surrogate witness who simply could

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[3] For instance, one physician who mixed drugs for lethal injections in Missouri admitted in litigation involving the constitutionality of that practice that he was dyslexic and "ha[d] difficulty with numbers and oftentimes transpose[d] numbers." *Taylor v. Crawford*, 2006 WL 1779035, at *7 (W.D. Mo. June 26, 2006).

explain how license plates can be read from afar or could describe the characteristics of that particular digital clock. In both of those instances, the testimonial statements at issue do nothing more than transcribe numbers. Similarly, under the New Mexico Supreme Court's reasoning, nearly every police report could be introduced through a surrogate witness. If the report recorded objective facts (*e.g.*, the read-out of a radar gun, the address above the front door of a house, or really any other objective physical data), the report would be admissible so long as another officer testified regarding any technology the original officer deployed and the department's standard operating procedures.

The only reason the New Mexico Supreme Court provides to suggest that its "mere scrivener" rule would not upend all of the settled law forbidding surrogate testimony under these other circumstances is its assertion that Caylor's creation of the forensic report did not require any "interpret[ive]" skill and thus did not "present[] a risk of error that might be explored on cross-examination." JA 13 (internal quotation marks and citation omitted).[4] But even if this prediction concerning the usefulness of cross-examination here distinguished the non-forensic examples above, this reasoning would be flatly impermissible. This Court has already made abundantly clear that the traditional guarantees of

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[4] This assertion is highly dubious as a factual matter. Even when a chromatogram produces a number along with graphs, an analyst must interpret the graphs to be sure that the machine conducted a valid test. *See* NACDL Amicus Br.

the Confrontation Clause cannot be "dispens[ed] with" simply because a testimonial statement is "obviously reliable." *Crawford*, 541 U.S. at 62; *accord Melendez-Diaz*, 129 S. Ct. at 2536. This is because the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Accordingly, analysts who write reports that the prosecution introduces are personally "subject to confrontation," even if they have "the veracity of Mother Teresa." *Melendez-Diaz*, 129 S. Ct. at 2537 n.6. The same must be true here, even if the analysts supposedly did nothing more than write down what a machine said.

b. Even if the Confrontation Clause did permit surrogate testimony when a nontestifying witness "was a mere scrivener," JA 13, the State still could not prevail here. As a factual matter, Caylor's testimonial statements in the forensic report that the State introduced went far beyond merely transcribing the purported machine-generated BAC reading of .21.

In the forensic report, Caylor certified by his signature that the seal of petitioner's blood sample "was received intact and broken in the laboratory." JA 62. He also certified that he made sure the forensic report number and the sample number "correspond[ed]." JA 64. Caylor further attested that he "conduct[ed] a chemical analysis," JA 64, according to the "gas chromatograph method" of testing. JA 63. And, by leaving the "[r]emarks" section of the form blank, Caylor implicitly certified that there was not "any circumstance or condition that might [have] affect[ed] the integrity of the

sample or otherwise affect[ed] the validity of the analysis." JA 65.

These statements describe past events and human actions, not machine-generated data. What is more, these statements constituted powerful evidence against petitioner. Among the leading reasons for forensic errors are contaminations of samples, switching samples, and running the wrong kinds of tests. Caylor's assertions that none of these things occurred here thus provided fodder for potentially important cross-examination. Yet because the State put an analyst other than Caylor on the stand, it insulated Caylor's testimonial assertions from adversarial testing. This violated the Confrontation Clause under any reasonable interpretation of the provision.

CONCLUSION

For the foregoing reasons, the judgment of the New Mexico Supreme Court should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 09-10876

In The Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

NEW MEXICO,

Respondent.

On Writ Of Certiorari To The New Mexico Supreme Court

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QUESTIONS PRESENTED

1. Whether a scientific test result generated by a machine is testimonial when it is recorded contemporaneously with the testing in a non-adversarial, unsworn public record.

2. Whether, if the public record is testimonial, the admission of transcribed raw data violates the Confrontation Clause when the defendant had an opportunity to confront a live witness about laboratory procedures and the functioning and accuracy of the machine, as well as an opportunity to retest the substance evaluated by the machine at the government's expense.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 7

I. THE REPORT IS NONTESTIMONIAL AND THUS NOT SUBJECT TO THE CONFRONTATION CLAUSE 7

A. Scientific evidence is testimonial only if it is contained in formalized testimonial materials; the unsworn report in this case is distinguishable from the affidavit in *Melendez-Diaz* 10

B. The definition of testimonial should not be expanded to include non-adversarial, unsworn public records containing scientific observations 21

1. The Confrontation Clause protects against the common-law abuse of admitting at trial statements made to magistrates during pre-trial *ex parte* examinations 24

2. Public records prepared by public officials who are not members of law enforcement are non-adversarial and thus do not implicate the purposes of the Confrontation Clause 27

TABLE OF CONTENTS – Continued

Page

3. *Crawford* can be viewed as applying a prophylactic rule that protects the adversary process, and the rule should be narrowly tailored to inquisitorial abuses; an officer's request for scientific analysis is not an interrogation and does not present a danger of prosecutorial abuse 35

C. The *Hammon* primary purpose definition of testimonial should be overruled because it is unworkable, flawed, and overly broad in relation to the purposes of the Confrontation Clause 41

II. EVEN IF THE REPORT IS TESTIMONIAL, ADMISSION OF THE REPORT WITHOUT THE ANALYST'S APPEARANCE AT TRIAL DID NOT DEPRIVE PETITIONER OF THE RIGHT OF CONFRONTATION 52

A. The opportunity to confront machine-generated raw data by retesting is at least equivalent to cross-examination as a means of in-trial confrontation 52

B. A witness with knowledge of laboratory procedures and the functioning of the machine testified at trial and was cross-examined 56

TABLE OF CONTENTS – Continued

Page

III. IF THE TRIAL COURT ERRED IN ADMITTING THE REPORT, OR ANY PART OF THE REPORT, THE ERROR WAS HARMLESS 59

CONCLUSION 60

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Arizona v. Evans, 514 U.S. 1 (1995).....34

Barber v. Page, 390 U.S. 719 (1968).....55

Berkemer v. McCarty, 468 U.S. 420 (1984).....38

Bourjaily v. United States, 483 U.S. 171 (1987).....40, 41, 43, 49

Brookhart v. Janis, 384 U.S. 1 (1966).....56

California v. Green, 399 U.S. 149 (1970).....52

Chavez v. Martinez, 538 U.S. 760 (2003).....37

Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123 (1919).....29

Crawford v. Washington, 541 U.S. 36 (2004).....*passim*

Davis v. United States, 512 U.S. 452 (1994).....38

Davis v. Washington, 547 U.S. 813 (2006).....*passim*

Dowdell v. United States, 221 U.S. 325 (1911).....50

Dutton v. Evans, 400 U.S. 74 (1970).....49, 57

Escobedo v. Illinois, 378 U.S. 478 (1964).....37

Evanston v. Gunn, 99 U.S. 660 (1879).....15

Fare v. Michael C., 442 U.S. 707 (1979).....39

Faretta v. California, 422 U.S. 806 (1975).....27

Gilbert v. California, 388 U.S. 263 (1967).....53

Giles v. California, 554 U.S. 353 (2008).....43, 46

Hammon v. Indiana, 547 U.S. 813 (2006).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Heike v. United States, 227 U.S. 131 (1913) 19

Idaho v. Wright, 497 U.S. 805 (1990) 50, 51

Johnson v. United States, 333 U.S. 10 (1948) 30

Kirby v. Illinois, 406 U.S. 682 (1972) 38

Kirby v. United States, 174 U.S. 47 (1899) 35, 40, 50

Kyles v. Whitley, 514 U.S. 419 (1995) 30

Lee v. Illinois, 476 U.S. 530 (1986) 36

Lilly v. Virginia, 527 U.S. 116 (1999) 36

Maryland v. Shatzer, 130 S. Ct. 1213 (2010) 38

Mattox v. United States, 156 U.S. 237 (1895) ..... *passim*

McNeil v. Wisconsin, 501 U.S. 171 (1991) 25

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) ..... *passim*

Miranda v. Arizona, 384 U.S. 436 (1966) 36, 37, 39

Montejo v. Louisiana, 129 S. Ct. 2079 (2009) 42

Motes v. United States, 178 U.S. 458 (1900) 35

Nix v. Williams, 467 U.S. 431 (1984) 30

Ohio v. Roberts, 448 U.S. 56 (1980) ..... *passim*

Palmer v. Hoffman, 318 U.S. 109 (1943) 27

Payne v. Tennessee, 501 U.S. 808 (1991) 42

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 27

Pointer v. Texas, 380 U.S. 400 (1965) 35, 50

TABLE OF AUTHORITIES – Continued

Page

Rothgery v. Gillespie County, 554 U.S. 191 (2008) 35

Salinger v. United States, 272 U.S. 542 (1926) 45

Schmerber v. California, 384 U.S. 757 (1966) 17

United States v. Ash, 413 U.S. 300 (1973) ..... *passim*

United States v. Henry, 447 U.S. 264 (1980) 40

United States v. Inadi, 475 U.S. 387 (1986) ..... *passim*

United States v. Owens, 484 U.S. 554 (1988) 56, 58

Watts v. Indiana, 338 U.S. 49 (1949) 27

White v. Illinois, 502 U.S. 346 (1992) ..... *passim*

White v. United States, 164 U.S. 100 (1896) 32

Whorton v. Bockting, 549 U.S. 406 (2007) 9, 28, 50

OTHER CASES

Coronado v. State, 310 S.W.3d 156 (Tex. App. 2010, pet. granted) 44

Heike v. United States, 192 F. 83 (2d Cir. 1911) 19, 32

In re Rolandis G., 902 N.E.2d 600 (Ill. 2008), *cert. denied*, 129 S. Ct. 2747 (2009) 44

King v. Aickles, 1 Leach 390, 168 Eng. Rep. 297 (1785) 31, 32

Manocchio v. Moran, 919 F.2d 770 (1st Cir. 1990) 34, 58

Marshall v. State, 232 P.3d 467 (Okla. Crim. App. 2010) 23

TABLE OF AUTHORITIES – Continued

Page

People v. Brown, 918 N.E.2d 927 (N.Y. 2009) 18

People v. Bryant, 768 N.W.2d 65 (Mich. 2009), *cert. granted*, 130 S. Ct. 1685 (2010) 45

People v. Geier, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009) 14

Raleigh's Case, 2 How. St. Tr. 1 (1603) 28

Smith v. State, 28 So. 3d 838 (Fla. 2010) (per curiam), *petition for cert. filed*, No. 09-10755 (May 10, 2010) 20

State v. Aragon, 225 P.3d 1280 (N.M. 2010) 59

State v. Basil, 998 A.2d 472 (N.J. 2010) 45

State v. Christian, 895 P.2d 676 (N.M. Ct. App. 1995) 33

State v. Dedman, 102 P.3d 628 (N.M. 2004) 34

State v. Dilboy, 999 A.2d 1092 (N.H. 2010), *petition for cert. filed*, No. 10-6278 (Aug. 31, 2010) 23

State v. Franklin, 308 S.W.3d 799 (Tenn. 2010), *petition for cert. filed*, No. 10-5746 (July 28, 2010) 44

State v. Weber, 19 P.3d 378 (Or. Ct. App. 2001) 20

United States v. Caraballo, 595 F.3d 1214 (11th Cir. 2010) 44

United States v. Bell, 785 F.2d 640 (8th Cir. 1986) 33

TABLE OF AUTHORITIES – Continued

Page

United States v. Enterline, 894 F.2d 287 (8th Cir. 1990) 30

United States v. Hernandez-Rojas, 617 F.2d 533 (9th Cir. 1980) 31

United States v. Johnson, 581 F.3d 320 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010) 44

United States v. Lamons, 532 F.3d 1251 (11th Cir. 2008) 20

United States v. Moon, 512 F.3d 359 (7th Cir.), *cert. denied*, 129 S. Ct. 39, *and cert. denied*, 129 S. Ct. 40 (2008) 20

United States v. Oates, 560 F.2d 45 (2d Cir. 1977) 33

United States v. Orozco, 590 F.2d 789 (9th Cir. 1979) 31, 51

United States v. Rosa, 11 F.3d 315 (2d Cir. 1993) 33

United States v. Ware, 247 F.2d 698 (7th Cir. 1957) 32

United States v. Washington, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009) 14

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

Fed. R. Evid. 803 29

Mass. Gen. Laws ch. 111, § 13 (West 2006) 14

N.M. Stat. Ann. § 66-8-102 (2010) 59

N.M. Stat. Ann. § 66-8-109 (2010) 15, 20

N.M. Stat. Ann. § 66-8-110 (2010) 14

N.M. R. Ann. 11-803 29

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TABLE OF AUTHORITIES – Continued

Page

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John Henry Wigmore, *Evidence* (1904) 58

STATEMENT OF THE CASE

Petitioner Donald Bullcoming rear-ended Dennis Jackson's truck while it was stopped at an intersection in Farmington, New Mexico, on August 14, 2005. JA 2-4, 29; Tr. 48-50. Mr. Jackson asked his wife, a passenger, to call the police when he saw that Petitioner had bloodshot eyes and smelled of alcohol. JA 3. Upon hearing the police had been called, Petitioner left the scene of the crime. *Id.* The responding officer located Petitioner a short time later and observed that he had watery, bloodshot eyes and slurred speech and he smelled of alcohol. *Id.*; Tr. 86, 91. Petitioner stated to another officer that he had not had a drink since early in the morning. JA 3. After Petitioner failed standard field sobriety tests, the officer arrested him for driving while intoxicated (DWI). *Id.*; Tr. 102-08.

When Petitioner refused to take a breath test, the arresting officer obtained a search warrant pursuant to New Mexico's Implied Consent Act and took him to the local hospital. JA 3-4; Tr. 109. A nurse extracted a sample of Petitioner's blood. JA 62; Tr. 69-70.

The arresting officer and the nurse filled out information on a Report of Blood Alcohol Analysis. JA 62. The report showed it was received by the New Mexico Department of Health's laboratory on August 16, 2005, that the sample seal was received intact, and that the seal was broken in the laboratory by the testing analyst on August 17, 2005. *Id.* Based on results generated by a machine, the analyst certified

that the sample showed a concentration of alcohol of .21 grams per 100 milliliters of blood. *Id.*

The following day, a reviewer certified on the report that the analyst met the necessary qualifications and followed established procedures for conducting the analysis. *Id.* A laboratory employee certified that a copy of the report was mailed to Petitioner on August 22, 2005. *Id.*

At trial, both the nurse and the arresting officer testified. Tr. 65, 97. The report was admitted into evidence through the testimony of Gerasimos Razatos, an analyst with the Department of Health. JA 48-60. Mr. Razatos reviewed the report but did not participate in performing the test or preparing the report. JA 49, 58. The analyst who performed the test had recently been placed on unpaid leave for unexplained reasons. JA 58. Petitioner objected to the section of the report prepared by the testing analyst, claiming it violated his right of confrontation because the testing analyst did not appear at trial and the report was prepared in anticipation of litigation. JA 44-46. The trial court admitted the report as a business record and held admission of the report was not prohibited by *Crawford v. Washington*, 541 U.S. 36 (2004). JA 45-46.

Mr. Razatos testified about the standard procedures of the laboratory. JA 49-59. He stated that the instrument used to analyze the blood was a gas chromatograph, a machine that detects compounds in the blood. JA 54. He also testified that the gas

chromatograph prints out the result and then the result is transcribed on the report. JA 54, 56. He confirmed that "there's nothing that the human has to do, other than look at the machine and record the results" and "any human being could look and write and just record the result." *Id.* Although Petitioner had a full opportunity to cross-examine Mr. Razatos, he asked no questions about the machine (JA 58-59), so despite Petitioner's discussion of gas chromatography (Br. 4, 35 n.4; *see* Amici NACDL Br. 5-22), no contrary information about the machine appears in the state court record.

During closing argument, defense counsel argued that the jury should question the accuracy of the blood analysis because the testing analyst was not present and had been placed on unpaid leave for unknown reasons. JA 60-61. At the end of the trial, the jury returned a verdict of guilty of DWI. R. 79.

Following affirmance by the intermediate state appellate court, the New Mexico Supreme Court held on discretionary review that the report was testimonial as defined by *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). JA 5-11. The court rejected the State's claim that an oath is required before a report may be considered sufficiently formal to qualify as the functional equivalent of live testimony. JA 11-12. The court nonetheless determined that the report could be admitted through the live testimony of a qualified analyst because the testing analyst merely transcribed results from a machine and, for

Confrontation Clause purposes, the machine was the true accuser. JA 13-16.

SUMMARY OF THE ARGUMENT

In evaluating whether there is a Sixth Amendment right to confront the declarant of an out-of-court statement at trial, the threshold question under *Crawford* is whether the statement is testimonial. Petitioner largely avoids this procedural question and instead addresses the substantive matter of the utility of cross-examination for the out-of-court statement at issue in this case. Because the definition of testimonial does not depend on substantive reliability, Petitioner's arguments do not assist in answering the threshold question.

This Court in *Crawford* set out three possible definitions of testimonial and later applied one of those definitions in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813, 822 (2006): A statement to a police officer is testimonial when the objective primary purpose is to establish a past fact relevant to a possible future prosecution. However, in addressing the application of the Confrontation Clause to laboratory reports in *Melendez-Diaz*, the Court's narrow holding rests on the definition of testimonial that includes formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions. 129 S. Ct. at 2532. Although the Court also addressed the report under the *Hammon* primary purpose definition, *id.*, this discussion is not

part of the Court's holding. *See id.* at 2543 (Thomas, J., concurring).

For scientific evidence, the question under this Court's precedent is whether the statements are contained in formalized testimonial materials. The scientific evidence in this case is contained in a report that does not qualify as formalized testimonial material because it was not prepared under oath and is neither an affidavit nor a confession. Moreover, the inculpatory information in the report is a transcription of raw data produced by a machine. Machines are not witnesses within the meaning of the Sixth Amendment.

The Confrontation Clause should not be expanded beyond the Court's existing precedent to include non-adversarial public records. The purpose of the Confrontation Clause is to protect the adversarial right of confrontation and to prevent the substitution of inquisitorial practices for the adversarial trial process. Non-adversarial public records, like the report here prepared by an agency independent of law enforcement, do not offend the adversarial purposes of the Confrontation Clause. Further, the *Hammon* primary purpose test should not be extended to this case because there was no police interrogation or opportunity for prosecutorial influence.

The report is decidedly nontestimonial. However, the state court concluded otherwise based on the *Hammon* primary purpose definition. This definition has caused widespread confusion in the lower courts.

It is flawed, unworkable, and overly broad in relation to the adversarial purpose of the Confrontation Clause. For these reasons, Respondent respectfully seeks the overruling of *Hammon* and further proposes an alternative definition of testimonial based on this Court's opinion in *United States v. Inadi*, 475 U.S. 387 (1986). Under the principles set out in *Inadi*, a statement is testimonial only if it is a substitute for live testimony in that the context in which it was made provides no independent evidentiary significance in evaluating its content. This definition more closely adheres to the adversarial goals of the Confrontation Clause than the *Hammon* definition. Non-adversarial public records, like the one in this case, are not testimonial because they are not substitutes for live testimony.

Even if the public record in this case could be viewed as testimonial, the New Mexico Supreme Court properly ruled that the adversarial protections provided to Petitioner satisfied the right of confrontation. Petitioner had an opportunity to confront the raw data through retesting, and he had an opportunity to cross-examine a witness with personal knowledge of the laboratory's procedures and the functioning of the machine. This Court has said that the Confrontation Clause does not demand incidental benefits at the cost of preventing the fair administration of criminal justice. *Mattox v. United States*, 156 U.S. 237, 243 (1895). Petitioner is not entitled to an incidental benefit when he received substitute means of

confrontation equal or superior to cross-examination of the testing analyst.

Respondent does not ask this Court to overrule or modify *Crawford* or the holding of *Melendez-Diaz*. Recognizing the procedural course this Court charted in *Crawford*, Respondent asks the Court to stay true to *Crawford*'s procedural heading rather than follow *Hammon*'s purpose-based substantive detour. The Court has not previously held that the Confrontation Clause applies to unsworn public records prepared by scientists, and the procedural purpose of the Confrontation Clause does not support an expansion of the Court's holdings to the public record in this case.

ARGUMENT

I. THE REPORT IS NONTESTIMONIAL AND THUS NOT SUBJECT TO THE CONFRONTATION CLAUSE.

In *Crawford*, the Court recognized that an accused's right under the Confrontation Clause "to be confronted with the witnesses against him" could be read as establishing the right to confront "those who actually testify at trial," "those whose statements are offered at trial," or "something in-between." 541 U.S. at 42-43. The Court thus recognized the potential for two absolute views of the Clause. Under the first view, a defendant would not have a constitutional right to confront hearsay declarants who do not appear at trial; under the second view, a defendant

would have the right to in-trial confrontation of all hearsay declarants. The Court rejected both absolute views and instead chose "something in-between" – an interpretation of the Clause that provides not only the right to in-trial confrontation of in-trial witnesses but also the right to confront hearsay declarants who reasonably can be considered witnesses against the accused because they have given testimony. *Id.* at 51, 67. "'Testimony,' in turn, is typically a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51. Thus, whether the Confrontation Clause applies to a particular statement depends on whether the declarant of the statement was a witness bearing testimony or, as described in *Crawford*, whether the statement is testimonial. *Id.* at 51-52; *see White v. Illinois*, 502 U.S. 346, 358 (1992) ("[T]he admissibility of hearsay statements raises concerns lying at the periphery of those that the Confrontation Clause is designed to address.").

The Court in *Crawford* also rejected the view of *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), that the right of confrontation is a substantive guarantee defined by the reliability of evidence and the utility of cross-examination. In *Crawford*, the Court adopted a procedural interpretation of the right and explained that "[t]he *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." *Id.* at 62. "Dispensing with confrontation because testimony is

obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.*

Thus, under *Crawford*, neither reliability nor the utility of cross-examination determines the application of the Confrontation Clause to hearsay. That a defendant can postulate ways in which cross-examination may be useful in exposing the unreliability of a hearsay statement has no more bearing on the inquiry under *Crawford* than the ineffectiveness of cross-examination based on a statement's inherent reliability.

Petitioner argues that the fatal flaw with the report is that it was presented through a surrogate witness who could not be effectively cross-examined regarding the information prepared by the testing analyst. In so doing, Petitioner focuses on the utility of cross-examination, a question of substantive reliability that does not assist in answering the threshold question whether the report in this case is testimonial.

Petitioner's emphasis on the utility of cross-examination fails to account for the fact that the Confrontation Clause applies only to testimonial hearsay statements, not to all hearsay. *See Whorton v. Bockting*, 549 U.S. 406, 419-20 (2007). Each of the benefits of cross-examination discussed by Petitioner applies equally to testimonial and nontestimonial statements. In Petitioner's example of the man who observes an altercation between two neighbors, Br. 21, the man's statements to police the next day would meet the current definition of testimonial, *see*

Hammon, 547 U.S. at 822, but if he made the same statements to his wife, those statements would not be testimonial. *See Crawford*, 541 U.S. at 51. Yet, the defendant would benefit from an opportunity to cross-examine the man about his statements to his wife in exactly the same way he would benefit from the opportunity to cross-examine him about his statements to the police. Indeed, Petitioner's argument is that the wife should not be allowed to testify about her husband's statements because the defendant would lose the benefits of cross-examining the husband on matters only he can answer. The threshold confrontation question in this example is not whether and how cross-examination might benefit a defendant; it is instead whether the statement is testimonial.

A. Scientific evidence is testimonial only if it is contained in formalized testimonial materials; the unsworn report in this case is distinguishable from the affidavit in *Melendez-Diaz*.

1. In *Crawford*, the Court listed three possible definitions of testimonial: one based on a declarant's subjective expectation about the statement's use in a criminal prosecution, one that includes only formalized testimonial materials, and one based on an objective view of the statement's possible use at a future trial. *Id.* at 51-52. All of these definitions attempt to capture a core class of testimonial statements that includes live testimony and its functional equivalent. However, the Court declined to adopt any

one definition because custodial interrogations qualify as testimony "even under a narrow standard." *Id.* at 52.

Following *Crawford*, the Court has continued to refer to these three proposed definitions. In *Davis*, the declarant made statements identifying the defendant as her assailant during a 911 call reporting domestic violence and seeking assistance. 547 U.S. at 818. In *Hammon*, the declarant made statements to police after they arrived at the scene and questioned her. *Id.* at 819-20. Because both cases involved non-custodial police questioning, the Court needed to clarify the proper definition of testimonial. With some refinement, the Court adopted the third definition proposed in *Crawford*: statements made during a police interrogation for the objective "primary purpose" of establishing or proving "past events potentially relevant to later criminal prosecution." *Id.* at 822. Applying this definition, the Court concluded that the statements in *Davis* were not testimonial because they were made during an ongoing emergency but the statements in *Hammon* were testimonial because they were made after the alleged violence had occurred and for the primary purpose of establishing past criminal conduct. *Id.* at 828-29.

In *Melendez-Diaz*, the Court addressed the admission of statements provided to police in sworn certificates of analysis identifying substances seized from the defendant as cocaine. 129 S. Ct. at 2530-31. A majority of the Court found the statements testimonial because they were made in affidavits. *Id.* at

2532. Citing *Crawford*, the majority explained that affidavits, like sworn testimony in a preliminary hearing or a grand jury proceeding, "are incontrovertibly a '"solemn declaration or affirmation made for the purpose of establishing or proving some fact."'" *Id.* (quoting *Crawford,* 541 U.S. at 51, which quoted N. Webster, An American Dictionary of the English Language (1828)). In other words, the certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id.* (quoting *Davis,* 547 U.S. at 830).

Beyond this narrow holding, the Court's opinion in *Melendez-Diaz* also indicated that the statements contained in the certificates were testimonial because they were prepared under a Massachusetts statute making their "*sole purpose* . . . to provide 'prima facie evidence of the composition, quality and the net weight' of the analyzed substance." *Id.* Justice Thomas agreed with the majority's view that the statements were testimonial because they were made under oath but did not indicate agreement with the view that the statements were testimonial based on their purpose. *Id.* at 2543 (Thomas, J., concurring). Justice Thomas reasserted his position that the Confrontation Clause applies only to statements in formalized testimonial materials and cited his earlier opinions that criticized a purpose-based approach. *Id.*; *see Hammon*, 547 U.S. at 834-42 (Thomas, J., concurring in the judgment in part and dissenting in part); *White*, 502 U.S. at 364 (Thomas, J., concurring in part and concurring in the judgment).

In addition to Justice Thomas's lack of agreement on a *Hammon* rationale, four other Justices indicated in *Melendez-Diaz* that the primary purpose definition should not apply to scientific evidence. *See* 129 S. Ct. at 2552 (Kennedy, J., dissenting). Therefore, a majority of the Court did not apply the objective primary purpose definition of testimonial from *Hammon* to scientific evidence. Instead, the Court's limited holding in *Melendez-Diaz* is based on the second definition of testimonial proposed in *Crawford*: statements in "'formalized testimonial materials'" comprised of "'affidavits, depositions, prior testimony, and confessions.'" 541 U.S. at 52 (quoting *White*, 502 U.S. at 365 (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment)). Scientific evidence is currently evaluated under a different definition of testimonial than statements to police officers by eyewitnesses at the scene of a suspected crime.

2. Unlike the affidavit in *Melendez-Diaz*, the document in the present case is not sworn. JA 62. Although the absence of an oath is not by itself dispositive of formality, *see Crawford*, 541 U.S. at 52, the report is not an affidavit, a deposition, or prior testimony. Moreover, unlike Lord Cobham's examination admitted in Sir Walter Raleigh's trial, *id.*, the report is not an unsworn confession. The report is instead a public record, and it bears no more formality than any other unsworn public record.

The report is further distinguishable from the affidavit in *Melendez-Diaz* in other important ways. In *Melendez-Diaz*, the analyst prepared the affidavit

nearly one week after the completion of testing. 129 S. Ct. at 2552. The sole purpose of the affidavit was to establish an element of a crime in a criminal prosecution, *id.* at 2532, so presumably an officer would not have requested and an analyst would not have prepared such an affidavit unless it were inculpatory. *See* Mass. Gen. Laws ch. 111, § 13 (West 2006) (requiring an analyst to prepare an affidavit "upon request" of an officer).

The report in this case does not have these qualities. Analysts with the Department of Health enter the result of the blood analysis on the report at the time of testing. JA 64. The analyst in this case, unlike the one in *Melendez-Diaz*, contemporaneously described a machine's statement about "the *present condition* of the blood." *United States v. Washington*, 498 F.3d 225, 232 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009); *accord People v. Geier*, 161 P.3d 104, 139 (Cal. 2007) ("contemporaneous recordation of observable events"), *cert. denied*, 129 S. Ct. 2856 (2009). "An observation recorded at the time it is made is unlike the usual act of testifying." *Melendez-Diaz*, 129 S. Ct. at 2551 (Kennedy, J., dissenting).

In addition, the analyst completes the report regardless of whether the result favors the State or the donor. The Department of Health provides its results in a non-adversarial manner by sending them to both parties and retaining a sample of the blood for retesting. The results may benefit either party in that they may be inculpatory or exculpatory. *See* N.M. Stat. Ann. § 66-8-110(B) (2010). Moreover, an

arrestee may request blood testing by an analyst of his or her choosing at the State's expense. N.M. Stat. Ann. § 66-8-109(B), (E) (2010).

The analyst follows a routine manner of preparation and analyzes the blood pursuant to a duty imposed on the public agency by law. *See Evanston v. Gunn*, 99 U.S. 660, 666 (1879) (upholding the admission of a public record containing meteorological observations because the record "had been kept by a person whose public duty it was to record truly the facts stated in it"). The report is thus like other non-adversarial public records containing observations made under a legal duty, such as birth certificates or judgments of conviction. Neither the contemporaneous recording of the result nor the public duty to make the observation can be replaced by live testimony or recreated in a courtroom. In other words, an analyst does not become a witness by performing scientific tests in a laboratory; an analyst only becomes a witness by testifying.

These qualities sharply distinguish the report in this case from the sworn certificate of analysis in *Melendez-Diaz*. There, the Court did not review a non-adversarial scientific report prepared in a laboratory during scientific testing. The Court instead addressed an affidavit prepared by an analyst at a later date upon an officer's request. Like former testimony or depositions, there were no circumstances surrounding the preparation of the affidavit that would have provided probative information to a fact-finder beyond the content of the document. In effect,

Massachusetts deliberately turned the non-adversarial laboratory into an adversarial courtroom and the analyst from a scientist making a contemporaneous observation into a witness against the accused establishing a past fact. This change in the analyst's role, rather than the laboratory testing itself, triggered the procedural protections of the Confrontation Clause.

Thus, the Court's opinion in *Melendez-Diaz* does not support Petitioner's attempt to transform the holding into a categorical rule that "forensic reports are testimonial." Br. 11. The Court did not broadly decide, as characterized by Petitioner, that "forensic reports are 'testimonial statements' inasmuch as analysts who create such reports are 'witnesses' for purposes of the Sixth Amendment." Br. 9. The Court instead decided that affidavits are formalized testimonial material whether prepared by a scientist or any other witness. The report in this case is not an affidavit or other formalized testimonial material. It is therefore nontestimonial.

3. The particular type of scientific evidence at issue – raw data – also sets this case apart from the Court's *Crawford* precedent. In *Melendez-Diaz*, the trial record did not reveal the extent of interpretation and judgment involved in the analyst's identification of the controlled substance. 129 S. Ct. at 2537. There is no such ambiguity in this case; the trial record establishes without dispute that the analyst copied a number from a machine printout to the

report without interpretation or any independent assessment. JA 54, 56.

The text of the Sixth Amendment applies to "witnesses." The Court's decisions in *Crawford*, *Davis*, and *Melendez-Diaz* address how to determine whether an out-of-court statement of a witness, that is, a person, is testimonial. For blood alcohol test results, the statement at issue is the result generated by the gas chromatograph. But a machine, of course, cannot act as a witness, and a machine-generated test result is not a statement. Rather, the test result is raw data indicating the alcohol content of the blood sample analyzed by the machine.

In this case, the machine generated the raw data in the form of a printout. JA 56. Like the blood itself, or other real evidence such as a photograph, the machine printout is not testimonial evidence. *Cf. Schmerber v. California*, 384 U.S. 757, 764 (1966) (describing blood as "'real or physical evidence'" for purposes of the Fifth Amendment). Indeed, the New Mexico Supreme Court recognized that the "raw data produced by the gas chromatograph machine . . . is not subject to the constraints of the Confrontation Clause." JA 17. Petitioner does not appear to disagree with the state court's conclusion on this point. *See* Br. 33.

Petitioner complains, however, that he was denied the right to confrontation because the analyst who transcribed the raw data onto the report did not

testify. Br. 33-36.[1] Although the printout itself apparently would have been admissible, Petitioner argues that the mere act of recording raw data onto a public or business record is sufficient to trigger the confrontation right. Respondent disagrees. Just as the "narrowly circumscribed" act of authenticating a copy of an existing public record does not involve "interpretation of what the record contains or shows," *see Melendez-Diaz*, 129 S. Ct. at 2539, the simple act of copying raw data onto a public record does not involve interpretation of what the raw data shows. *See People v. Brown*, 918 N.E.2d 927, 931 (N.Y. 2009) ("[T]he technicians' use of the typing machine would not have entailed any such subjective analysis."); *cf. Mattox*, 156 U.S. at 244 (observing that "all the authorities hold that a copy of the stenographic report of [the witness's] entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, . . . is competent evidence of what he said"). The mere act of copying raw data onto a public or business record cannot be viewed as a statement or declaration separate or distinct from the raw data itself, any

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[1] Petitioner also argues that the analyst made statements aside from the transcription, including a statement about following laboratory procedures in obtaining the machine result. Br. 36. Beyond the fact that this statement is not contained in formalized testimonial materials, Petitioner did not separately object to this statement or request a redaction in the trial court (JA 44-47), and in fact, a reviewer made the same statement about procedures having been followed (JA 62) without Petitioner demanding the reviewer's appearance at trial.

more than the act of authenticating a copy is distinct from the copy itself. Therefore, the Confrontation Clause applies to neither raw data nor a mere transcription of raw data onto a public or business record.

In *Heike v. United States*, 227 U.S. 131, 144-45 (1913), the Court addressed a Confrontation Clause claim directed at transcribed raw data. In a conspiracy and revenue fraud case involving the importation of sugar, the prosecution proved fraud by comparing company records of sugar weights, referred to as "pink books," with government records of weights, referred to as "dock books." *Heike v. United States*, 192 F. 83, 94-97 (2d Cir. 1911). On certiorari, the defendants argued that the admission of the company's pink books violated the hearsay rule and the Confrontation Clause because not all of the weighers or transcribers testified at trial. *See* 227 U.S. at 136, 144; 192 F. at 96-97. The Court summarily rejected the defendants' Confrontation Clause claims, finding no violation of the Clause by the admission of the pink books in the absence of testimony by the weighers. 227 U.S. at 144-45.

In *Heike*, the weighers did no more than note the weight shown on the scales so it could be entered into the pink books. 192 F. at 96-97. Similarly, in this case, the analyst's role in noting the test result on the report was simply to transcribe the blood-alcohol content measured by the machine. The only difference is that the analyst used a gas chromatograph to measure the alcohol in Petitioner's blood, while the weighers in *Heike* used a scale to measure the weight

of sugar the defendants had imported. In both cases, the evidence at issue was raw data that was not subject to the Confrontation Clause.

Raw data is generated in many different ways, including machine-generated chemical analysis, statistical analysis by computer program, analysis of breath-alcohol content by a breath alcohol machine, and detection of a vehicle's speed by radar.[2] As the Seventh Circuit explained, if the raw results of a scientific analysis "are 'statements' by a 'witness against' the defendants, then the machine must be the declarant. Yet how could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests." *Moon*, 512 F.3d at 362.

Of course, such measures are not necessary to confront raw data. In contrast to statements made by a witness, which can be challenged primarily through cross-examination, raw data can be challenged by retesting the physical evidence. Petitioner's blood sample was available for retesting upon request. JA 52; *see also* N.M. Stat. Ann. § 66-8-109(B). If Petitioner had a concern about transposition of numbers,

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[2] *See, e.g.*, *United States v. Moon*, 512 F.3d 359, 361-62 (7th Cir.), *cert. denied*, 129 S. Ct. 39, *and cert. denied*, 129 S. Ct. 40 (2008); *United States v. Lamons*, 532 F.3d 1251, 1262-65 (11th Cir.), *cert. denied*, 129 S. Ct. 524 (2008); *Smith v. State*, 28 So. 3d 838, 853-55 (Fla. 2009) (per curiam), *petition for cert. filed*, No. 09-10755 (May 10, 2010); *State v. Weber*, 19 P.3d 378, 381 (Or. Ct. App. 2001).

the accuracy of the machine, or compliance with laboratory protocols, he had more effective means of testing the raw data than demanding a machine's presence in court or cross-examining a transcriptionist[3] that in all reasonable likelihood would not have had any independent recollection of the particular transcription in this case. The very fact that raw data is susceptible to challenge through retesting, but not cross-examination (because one cannot cross-examine a machine), demonstrates that raw data is not a testimonial statement to which the confrontation right applies. *Cf. United States v. Ash*, 413 U.S. 300, 318 n.10 (1973) (noting that duplication is not typically a quality of an adversarial proceeding).

B. The definition of testimonial should not be expanded to include non-adversarial, unsworn public records containing scientific observations.

As shown above, applying the formalized testimonial materials definition of testimony from *Melendez-Diaz* to the scientific report in this case is a

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[3] Respondent recognizes that the analyst had a larger role in the *testing* than merely making a transcription (*see* JA 53-54, 64-65), but the Confrontation Clause challenge in this case concerns the preparation of and statements in a report, not the process of scientific testing. The New Mexico Supreme Court correctly described the analyst's role in writing the number on the report as that of a scrivener. JA 2.

relatively straightforward matter. To the extent there is any question about the nontestimonial quality of the report, it is largely a product of *Melendez-Diaz* discussing both the substantive reliability of scientific evidence and the primary purpose definition of testimonial from *Hammon*. With respect to the former, the Court expressly reaffirmed the determination in *Crawford* that the application of the Confrontation Clause does not depend on a statement's reliability and noted that the discussion of reliability was simply in response to the dissent. *Melendez-Diaz*, 129 S. Ct. at 2537 n.6. With respect to the discussion of the purposes of the document, it does not appear to reflect the views of a majority of Justices and, in any case, is not part of the holding explicitly set out in the Court's opinion: "The analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation. . . ." *Id.* Nonetheless, the *Hammon*-derived dicta has fostered confusion.

Applying *Melendez-Diaz*, the New Mexico Supreme Court recognized that the "narrowest grounds for the holding are found in Justice Thomas's concurrence." JA 11. However, the court determined the report was testimonial and the lack of an oath in preparing the report was not dispositive because the certificates were produced for "'the purpose of establishing or proving some fact.'" JA 12 (quoting *Melendez-Diaz*, 129 S. Ct. at 2532). Other lower court decisions applying *Melendez-Diaz* reflect this same confusion about whether the *Hammon* primary

purpose definition of testimonial applies to scientific evidence. *Compare, e.g., State v. Dilboy*, 999 A.2d 1092, 1105 (N.H. 2010) ("Justice Thomas's concurring opinion . . . underscores the limited reach of *Melendez-Diaz*."), *petition for cert. filed*, No. 10-6278 (Aug. 31, 2010), *with Marshall v. State*, 232 P.3d 467, 475 (Okla. Crim. App. 2010) (concluding a report was testimonial because it "was prepared for use in a criminal trial").

Two aspects of the dicta in *Melendez-Diaz* are particularly noteworthy: (1) the rejection of a public records rationale, 129 S. Ct. at 2538, and (2) the description of the affidavit as the product of police interrogation, 129 S. Ct. at 2535. Viewing these two considerations in the context of the purpose of the Confrontation Clause, they do not support an extension of *Hammon* to this case. Public records are not inquisitorial when they contain routine scientific observations by public officials who are independent of law enforcement, even if they are made at the arm's length request of a police officer. These non-inquisitorial documents do not threaten the Confrontation Clause's protection of the adversarial system of criminal justice.

1. The Confrontation Clause protects against the common-law abuse of admitting at trial statements made to magistrates during pre-trial *ex parte* examinations.

In *Crawford*, noting that the Confrontation Clause's text alone does not reveal its scope, the Court turned "to the historical background of the Clause." 541 U.S. at 42-43. That historical background reveals a specific abuse targeted by the Framers as requiring redress to ensure the adversarial process in criminal prosecutions: the use at trial of a pre-trial *ex parte* judicial examination of a witness in lieu of the witness's appearance at trial. *Id.* at 43. This abusive practice traces back to the Marian bail and committal statutes. *Id.*

The bail statute of 1554 required the magistrate to "take the examination" of the accused and his accusers regarding the circumstances of arrest and the facts "material to prove the felony" and to reduce the examination to writing and certify the examination to supervising judges. John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* 11 (1974) [*Prosecuting Crime*]. The committal statute, enacted the following year, adopted a similar procedure for magistrates committing an accused to jail pending the trial. *Id.* at 16.

These statutes did not require the examining magistrate to elicit exculpatory information from the accused or the witnesses. *Id.* at 18. As a result, the

magistrate examinations were inquisitorial in nature. Indeed, the magistrate's "job was to help the accuser build the prosecution case, rather than to serve as a neutral investigator seeking all the evidence, inculpating and exculpating." John H. Langbein, *The Origins of the Adversary Criminal Trial* 43 (2005) [*Origins*].

In *Crawford*, the Court determined the Confrontation Clause required exclusion of statements made by Sylvia Crawford to police who suspected her participation in the assault and attempted murder they were investigating. In so doing, the Court concluded that "[p]olice interrogations bear a striking resemblance" to the magistrate examinations under the Marian bail and committal statutes. *Crawford*, 541 U.S. at 52. This resemblance stems from the inquisitorial nature of custodial interrogations.

As an element of pre-trial investigation, such an inquisitorial procedure has its place, even within our adversarial criminal justice system. *See McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991). The abuse of the inquisitorial procedures of the Marian statutes occurred when the magistrate examinations were substituted for the adversarial process of the witness's appearance to testify at trial. *See Crawford*, 541 U.S. at 43-44, 50. Thus, the confrontation right is implicated only when the inquisitorial investigation substitutes for the adversarial examination of witnesses at trial.

This view is consistent with the role played by the Marian examination procedures in the development of the adversarial system of criminal prosecution. As the Court noted, the magistrate examinations probably were not intended to have evidentiary force at trial. *Id.* at 44 (citing *Prosecuting Crime*, *supra*, at 21-34). Nevertheless, statements made during these examinations "came to be used as evidence in some cases." *Id.* Yet, the examination procedures were decidedly favorable to the prosecution and unfavorable to the accused. For example, whereas the examining magistrate bound over the victim and material witnesses to appear at trial, the accused was not provided with a mechanism to compel witnesses on his behalf or learn the charges against him. *Origins*, *supra*, at 48-51. As a result, the Marian examination procedures had the effect of pressuring the accused to speak on his own behalf at trial. That effect, combined with the absence of the right to counsel, meant that the accused was forced "to respond in person to the charges and the evidence against him." *Id.* at 48. The move to an adversarial system addressed many of these effects of the Marian examination procedures "to even up for advantages of the prosecution." *Id.* at 333.

The Framers assured that the procedural aspects of the adversary system would remain inviolate by placing them in the Fifth and Sixth Amendments. The privilege against self-incrimination in the Fifth Amendment "was designed primarily to prevent 'a recurrence of the Inquisition and the Star Chamber.'"

Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990) (quoting *Ullmann v. United States*, 350 U.S. 422, 428 (1956)). Similarly, the Sixth Amendment rights to counsel, notice, compulsory process, and confrontation "guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice." *Faretta v. California*, 422 U.S. 806, 818 (1975). These rights, as well as other protections such as proof beyond a reasonable doubt, "are all characteristics of the accusatorial system and manifestations of its demands." *Watts v. Indiana*, 338 U.S. 49, 54 (1949).

2. Public records prepared by public officials who are not members of law enforcement are non-adversarial and thus do not implicate the purposes of the Confrontation Clause.

As these historical underpinnings of confrontation illustrate, the purpose of the Confrontation Clause with respect to out-of-court statements is to prevent an inquisition substituting for an adversarial trial. Not all out-of-court statements, however, implicate this purpose. In *Melendez-Diaz*, the Court observed that business records prepared in anticipation of litigation do not satisfy the hearsay exception for regularly kept records. 129 S. Ct. at 2538. However, this limitation on the hearsay exception is not based on adversarial concerns; it is strictly a matter of reliability based on the self-serving nature of the record and an associated motive to lie. *See Palmer v.*

Hoffman, 318 U.S. 109, 113-14 (1943). A motive to lie in a private business record, such as the report of a private detective for a client or the blood analysis of a private hospital for a patient, would not transform an otherwise nontestimonial document into a testimonial one. *See Whorton*, 549 U.S. at 420. Purely private acts are not inquisitorial or adversarial for purposes of the Sixth Amendment.[4]

The adversarial focus of the Confrontation Clause, however, requires closer scrutiny of records prepared by the government. This Court has recognized that public records are "unusually trustworthy sources of evidence" because they are "required by law to be kept," their official contents are "entered under the sanction of public duty," there is an "obvious necessity for regular contemporaneous entries in them," and there is "a minimum of motive on the part

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[4] For example, during Raleigh's trial, a witness named Dyer related a treasonous plot between Raleigh and Lord Cobham as described to Dyer by a gentleman in Portugal. *Raleigh's Case*, 2 How. St. Tr. 1, 25 (1603). This gentleman's primary purpose was certainly to establish past events, and viewed objectively, he had to know that the grave accusation (colloquially speaking) made to a man who favored the crowning of the king, *id.*, could have ramifications for apprehension or prosecution. However, unlike his objections to Lord Cobham's examination, Raleigh's objection to this private conversation was based on relevance, not confrontation. Richard H. Underwood, *Perjury: An Anthology*, 13 Ariz. J. Int'l & Comp. L. 307, 319-20 (1996). Raleigh's selective plea to confront inquisitorial statements is consistent with *Crawford*'s description of private conversations as nontestimonial, 541 U.S. at 51.

of public officials and employees to either make false entries or to omit proper ones." *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 128-29 (1919). Given their preparation by the government, however, trustworthiness for public records is uniquely linked to their non-adversarial character. As the Court observed in *Melendez-Diaz*, the hearsay exception does not include adversarial public records. 129 S. Ct. at 2538; *see* Fed. R. Evid. 803(8)(B) (excluding matters observed by police officers in criminal cases); N.M. R. Ann. 11-803(H) (same).

"Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases *because of* the adversarial nature of the confrontation between the police and the defendant in criminal cases." S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7064 (emphasis added). Thus, even though reliability and evidentiary rules are not determinative under *Crawford*, the hearsay exception for public records and *Crawford* share a common adversarial focus in a way that is not true of other hearsay exceptions. For this reason, even before *Crawford* overruled the reliability test of *Roberts*, courts assessed the adversarial nature of public records for purposes of hearsay in the same way that is now required for the Confrontation Clause.

The limitation on public records is primarily aimed at police reports, which are adversarial in nature. Police officers are involved in "the often

competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), and they also at times function as prosecutors, or as members of the prosecutorial team, *see Kyles v. Whitley*, 514 U.S. 419, 437 (1995). An officer's statements in a police report that establish or prove past facts have an accusatory quality by virtue of the officer's connection to the prosecutorial team. From an adversarial standpoint, proof of a fact at trial through an officer's observations in a police report would evoke the type of judicial or prosecutorial factfinding used in inquisitorial systems. *See Nix v. Williams*, 467 U.S. 431, 453 (1984) (Stevens, J., concurring in the judgment) ("The Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process, rather than the *ex parte* investigation and determination by the prosecutor."); *see also Ash*, 413 U.S. at 308-09 (noting the early adoption of "the institution of the public prosecutor from the Continental inquisitorial system" and the Sixth Amendment's role in minimizing "the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official"). The quasi-adversarial factfinding of a police officer thus implicates both the limitation on the hearsay exception and the purposes of the Confrontation Clause.

The same is not true of routine observations by police officers outside the adversarial enterprise of investigating a crime. *See, e.g., United States v. Enterline*, 894 F.2d 287, 290-91 (8th Cir. 1990)

("Neither the notation of the vehicle identification numbers themselves nor their entry into a computer presents an adversarial setting or an opportunity for subjective observations by law enforcement officers."); *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980) ("The recordation of a routine matter such as the fact and date of Hernandez's deportation is plainly not of the adversarial nature that might 'cloud the perception' of the law enforcement official.") (quoting *United States v. Orozco*, 590 F.2d 789, 793 (9th Cir. 1979)).

Nor is there an inquisitorial danger associated with reports by public officials, like the scientist in this case, who operate independently of law enforcement and therefore lack both an adversarial interest and a prosecutorial role in criminal proceedings. For these public officials, it does not advance the adversarial protections of the Confrontation Clause to examine their purposes in making a public record.

At common law, for example, the prosecution could rely on a jail's daily log to establish the defendant's date of release for purposes of proving the violation of a condition of pardon, even in the absence of testimony by the turnkeys who observed the prisoner's release and reported the matter to the clerk at the jail. *King v. Aickles*, 1 Leach 390, 391, 168 Eng. Rep. 297, 298 (1785). From an objective point of view, a jailor or a clerk at a jail could reasonably anticipate a future prosecutorial use of dates of release, particularly for prisoners subject to further requirements upon their release. Nonetheless, the court in *Aickles*

properly viewed the clerk as having no private interest in the case sufficient to induce him to make "factitious entries" in the log. 1 Leach at 392, 168 Eng. Rep. at 298. "He is a public officer recording a public transaction." *Id.*; *accord White v. United States*, 164 U.S. 100, 104 (1896) (discussing *Aickles* and observing that entries made by a clerk at a jail under a duty to keep a list of the dates of discharge "would be evidence in and of themselves").

Similarly, in *Heike*, the United States weighers might have, objectively speaking, anticipated the future prosecutorial use of the measurements in their dock books, but the Second Circuit did not scrutinize the public officials' purposes in their routine, ministerial duties. The Second Circuit rejected the hearsay and Confrontation Clause arguments relating to the dock books on the ground that the weights were contained in public records "admissible from a time anterior to the adoption of the Constitution," 192 F. at 94-95, a ruling not challenged on certiorari in this Court, *see* 227 U.S. at 136.

For over fifty years, courts have also analyzed under the public records exception whether laboratory reports prepared by scientists outside the law enforcement team should be deemed adversarial. Beginning in *United States v. Ware*, 247 F.2d 698, 699-700 (7th Cir. 1957), these courts distinguished between documents prepared by law enforcement personnel having an adversarial and prosecutorial role in a criminal proceeding and records of independent scientists who make observations according

to a non-adversarial public duty. *E.g., United States v. Rosa*, 11 F.3d 315, 332 (2d Cir. 1993) ("[T]hough law enforcement activities are typically accusatory and adversarial in nature, a medical examiner's reported observations as to a body's condition are normally made as part of an independent effort to determine a cause of death."); *United States v. Bell*, 785 F.2d 640, 644 (8th Cir. 1986) ("The relationship between police officers and those whom they arrest is much more personal and adversarial in nature than that between chemists and those whose urine they test.").[5]

Consistent with this authority, New Mexico decisions, prior to being overruled in the present case based on *Hammon* (JA 11), determined that blood alcohol reports like the one in this case are non-adversarial. "[T]he state laboratory is part of the State Department of Health; it is not an arm of law enforcement and its employees are not law enforcement personnel." *State v. Christian*, 895 P.2d 676, 681 (N.M. Ct. App. 1995). These public officials "follow a routine manner of preparation, in a non-adversarial setting." *Id.* at 682. The New Mexico Supreme Court later reached the same conclusion under both the public records hearsay exception and *Crawford*'s

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[5] By contrast, there may be greater concern about adversarial interests when a scientist is employed directly by a police agency *See United States v Oates*, 560 F.2d 45, 68 (2d Cir. 1977), *see also* Paul C Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials. The Reliability of Scientific Proof*, 49 Ohio St L J 671, 681-82 (1988).

adversarial interpretation of the Confrontation Clause. *State v. Dedman*, 102 P.3d 628, 635-36 (N.M. 2004).

Potential biases on the part of scientists do not determine whether a statement is testimonial because the Confrontation Clause does not depend on substantive reliability. *See Melendez-Diaz*, 129 S. Ct. at 2537 n.6. The important question for confrontation purposes is whether the public official serves an adversarial or prosecutorial role in judicial proceedings. Non-adversarial scientists are not under any more "pressure" and do not have any greater "incentive," *id.* at 2536, to alter evidence in favor of the prosecution than any other non-law-enforcement public official fulfilling a public duty in making an observation. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 15 (1995) (noting that, unlike police officers, court clerks "have no stake in the outcome of particular criminal prosecutions"); *Manocchio v. Moran*, 919 F.2d 770, 777, 779 (1st Cir. 1990) (determining that there was no reason to believe a medical examiner, who acts more as a physician than a police officer, would not faithfully discharge the "professional and official obligations under the statute"). The observations of scientists who are not part of the law enforcement team are neither self-serving nor prosecutorial; thus, a public record reflecting such observations does not implicate the Confrontation Clause.

3. *Crawford* can be viewed as applying a prophylactic rule that protects the adversary process, and the rule should be narrowly tailored to inquisitorial abuses; an officer's request for scientific analysis is not an interrogation and does not present a danger of prosecutorial abuse.

The text of the Confrontation Clause applies to an "accused" in "criminal prosecutions." U.S. Const. amend. VI. A suspect is not an "accused" and there is no "criminal prosecution" until the initiation of adversary judicial criminal proceedings, which marks "the point at which 'the government has committed itself to prosecute'" and "'the adverse positions of government and defendant have solidified.'" *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).[6] Nevertheless, the Court has applied the right of confrontation as an exclusionary rule to custodial confessions occurring prior to the commencement of a criminal prosecution because of their similarity to Marian inquisitorial examinations. *Crawford*, 541 U.S. at 52. A custodial confession takes place after an arrest and serves as the "point that our

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[6] The Court's early Confrontation Clause jurisprudence involved challenges to statements made during a criminal prosecution. *See, e.g., Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) (preliminary hearing); *Motes v. United States*, 178 U.S. 458, 474 (1900) (examining trial); *Kirby v. United States*, 174 U.S. 47, 54 (1899) (record of a collateral trial).

adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries." *Miranda v. Arizona*, 384 U.S. 436, 477 (1966). Thus, although police officers are neither professional prosecutors nor judicial officers, a custodial interrogation serves a prosecutorial function and is thus inquisitorial in its substance, if not strictly in its form.

In *Crawford*, the Court clarified that the Confrontation Clause targets "the unique potential for prosecutorial abuse." 541 U.S. at 56 n.7. For custodial interrogations, the Confrontation Clause "alleviate[s] the danger of one-sided interrogations by adversarial government officials who might distort a witness's testimony." *Melendez-Diaz*, 129 S. Ct. at 2548 (Kennedy, J., dissenting). This danger is particularly acute for custodial confessions among accomplices, which are "presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986). "[O]nce partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices." *Id.* at 544-45; *accord Lilly v. Virginia*, 527 U.S. 116, 137 (1999). *Crawford* and the Court's long line of custodial confession cases exclude statements made before the formal commencement of a criminal prosecution, and before the declarant becomes a formal witness against an

accused,[7] in order to prevent the danger of prosecutorial influence and blame shifting. Viewed in such terms, these cases are perhaps better understood as articulating a prophylactic rule, though the Court has not described the rule in this manner.

In an analogous way, the Court has adopted prophylactic measures to protect the Self-Incrimination Clause, including an exclusionary rule for unwarned pretrial statements. Although a "criminal case" under the Fifth Amendment may not technically begin with a custodial interrogation, *see Chavez v. Martinez*, 538 U.S. 760, 766-67 (2003) (plurality opinion), *Miranda*'s prophylactic exclusionary rule applies to an inquisitorial or prosecutorial relationship between a suspect and the government. *See Escobedo v. Illinois*, 378 U.S. 478, 485 (1964) ("Petitioner had become the accused, and the purpose of the [police] interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so."). Prophylactic rules of this kind

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[7] Petitioner argues that the testing analyst "became a 'witness' against [him] under the Confrontation Clause" when the State elected "to introduce [the] report." Br. 25; *accord* JA 12 ("offered to prove" a fact at trial). This focus on the trial use of a statement is misdirected. The Court has said it is the "character" of a statement that determines whether it is testimonial. *Davis*, 547 U.S. at 821. By itself, the government's use of an out-of-court statement at trial to prove a defendant's guilt does not transform a declarant into a witness against the accused. Otherwise, the Confrontation Clause would apply to all hearsay because hearsay is, by definition, an out-of-court statement offered at trial to prove the truth of the matter asserted.

must be narrowly tailored to fit their prophylactic purpose. *See, e.g.*, *Maryland v. Shatzer*, 130 S. Ct. 1213, 1220 (2010) ("A judicially crafted rule is 'justified only by reference to its prophylactic purpose,' *Davis v. United States*, 512 U.S. 452, 458 (1994), and applies only where its benefits outweigh its costs.")

The scope of the Confrontation Clause's exclusionary rule is governed by the Clause's purpose of preventing trial by inquisition. As a result, it is important that a preliminary police investigation is non-inquisitorial and does not by itself trigger the adversarial protections of the Fifth and Sixth Amendment. *See Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984) (*Miranda*); *Kirby*, 406 U.S. at 690 (plurality opinion) (no right to counsel during "a routine police investigation"). The danger of a police officer's prosecutorial influence over a declarant, whether a potential suspect, a potential victim, or a bystander, is not the same outside the custodial context.

The facts of *Hammon* help illustrate the different levels of potential prosecutorial influence in police questioning. There, officers spoke to Hershel Hammon in the kitchen, and he said his argument with his wife had not become physical. 547 U.S. at 819. The officers observed signs of an altercation and spoke to Amy Hammon in the living room. *Id.* Based on her account of the incident, an officer had her prepare a battery affidavit. *Id.* at 820. The officer's request for an affidavit served the same prosecutorial function as a Marian examination; it was the first formal accusatorial step toward an arrest and charge. Thus, the

affidavit was a testimonial statement. *Id.* at 821; *id.* at 840 n.5 (Thomas, J., concurring in the judgment in part and dissenting in part).

In contrast, the officer's initial inquiries were not prosecutorial. When the officer spoke to Mr. Hammon, he was not required to provide *Miranda* warnings because, without an arrest, the officer's interview of Mr. Hammon was non-adversarial. The officer had not yet become an inquisitor, and Mr. Hammon had not yet become "enmeshed in the adversary process." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). The officer's non-inquisitorial role did not change simply by moving from the kitchen to the living room and speaking with a potential victim rather than a potential suspect to continue the preliminary investigation. The officer's interviews with both Mr. and Mrs. Hammon were not the equivalent of a Marian magistrate's examination of a suspect or witness or the secret interrogations of the Star Chamber. These interviews were part of a routine and preliminary police investigation designed to gather facts rather than, as with Mrs. Hammon's affidavit, a prosecutorial attempt to prove a prior accusation.

Despite the extension of the exclusionary rule of the Confrontation Clause to Mrs. Hammon's statement, the Court's precedent shows there is typically no more than a minimal danger of prosecutorial influence in a non-custodial setting. Specifically, the Court has declined to apply the Confrontation Clause to co-conspirator statements procured by the government during a preliminary police investigation

through the use of confidential informants, *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987), or wiretapping combined with police activity designed to produce incriminatory statements, *Inadi*, 475 U.S. at 396-400. These "unwitting[ ]" statements to the police are "clearly nontestimonial." *Davis*, 547 U.S. at 825. Had there been a substantial danger of prosecutorial abuse at the pre-prosecutorial investigative stage, however, the "unwitting" quality of such statements would not have protected them from Confrontation Clause scrutiny. *Cf. United States v. Henry*, 447 U.S. 264, 270-74 (1980) (excluding statements deliberately elicited by a government informant in counsel's absence after indictment as interfering with the right to counsel but distinguishing the use of "undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity prior to the time charges are filed").[8]

In *Melendez-Diaz*, a police officer requested that a scientific analyst prepare an affidavit. 129 S. Ct. at 2535. In contrast, the officer in this case did not ask any analyst a question and instead sent a request for analysis to an institution as a whole. JA 62. The officer made this request at arm's length on a

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[8] If there is any attenuated danger of "underhanded prosecutorial tactics" or manipulation (Pet'r Br. 28, 32) in non-custodial settings, these dangers are fully curbed by due process. *See Kirby*, 406 U.S. at 690-91 (plurality opinion); *Melendez-Diaz*, 129 S. Ct. at 2548-49 (Kennedy, J., dissenting); *see also Ash*, 413 U.S. at 320.

standardized form prepared by the Department of Health. *Id.* There certainly was no police interrogation that could be described as "formal" or "a formalized dialogue," *Hammon*, 547 U.S. at 840 (Thomas, J., concurring in the judgment in part and dissenting in part). To the extent this request could be characterized as a "colloquial" police interrogation, *Crawford*, 541 U.S. at 53 n.4, it did not, unlike the request in *Melendez-Diaz*, present any more opportunity for prosecutorial influence than the non-custodial, unwitting statements in *Bourjaily* and *Inadi*. *See Melendez-Diaz*, 129 S. Ct. at 2552 (Kennedy, J., dissenting) ("[L]aboratory tests are conducted according to scientific protocols; they are not dependent upon or controlled by interrogation of any sort.").

C. The *Hammon* primary purpose definition of testimonial should be overruled because it is unworkable, flawed, and overly broad in relation to the purposes of the Confrontation Clause.

The above points show why the *Hammon* definition of testimonial should not be extended to the scientific evidence in this case. Nevertheless, confusion and uncertainty are likely to persist in lower courts due to the fractured positions in *Melendez-Diaz* and the different definitions of testimonial that currently apply to different classes of declarants. As a result, Respondent asks this Court to re-examine the primary purpose definition of testimonial and replace it with a definition that more closely adheres to the

purposes of the Confrontation Clause. The Court has already articulated such a definition, and the Court did so in *Inadi*, the very case cited in *Hammon* for the concept of the functional equivalent of live testimony, 547 U.S. at 828. Under *Inadi*, an out-of-court statement is testimonial if it is a substitute for live testimony, that is, a statement that derives no evidentiary significance from the context in which it was made such that its evidentiary value can be wholly replaced by live testimony.

1. *Stare decisis* is a principle of utmost importance, but it "is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). The Court will reconsider its precedent, particularly its recent precedent, when it is unworkable or not well reasoned. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009). Because the primary purpose test is flawed, unworkable, and inconsistent with the purposes of the Confrontation Clause, *Hammon* should be overruled.

The *Hammon* definition is flawed because its focus on objective purposes would, not unlike *Roberts*, require a judge to evaluate the truthfulness of a statement. In *Davis*, for example, the Court concluded that the statement was not testimonial because it was made during "an ongoing emergency" and the declarant, Michelle McCottry, "was speaking about events *as they were actually happening*." 547 U.S. at 827. To reach this conclusion, the Court had to assume the truth of Ms. McCottry's account of the timing and cause of her injuries. *See id.* at 818-19

(noting the injuries did not speak for themselves). Such an analysis contravenes the Court's express rejection of judicial determinations of trustworthiness in the Confrontation Clause's application. *See Giles v. California*, 554 U.S. 353, 365 (2008).

Additionally, the *Hammon* definition is inconsistent with *Crawford*'s procedural interpretation of the Confrontation Clause. "Purpose" evokes notions of intent or motive. There is little reason, other than in considering matters related to substantive reliability such as bias or motive to lie, to analyze a declarant's intent in making a statement. To the extent a private individual may have a prosecutorial motive, a person can anticipate the possible use of a statement in a future prosecution equally well whether making a statement to an acquaintance or to a police officer. There is also little reason to analyze the purpose or motive of an interrogator. As previously noted, the Confrontation Clause does not apply to unwitting statements to the police. Undoubtedly, the officers in *Bourjaily* and *Inadi* had a primary purpose to obtain information they could use in a future prosecution, but the officers' purpose did not offend the Confrontation Clause.

The primary purpose test is unworkable because it does not clarify *whose* purpose must be examined. In *Hammon*, the Court referred to both the police officer's purpose, *see* 547 U.S. at 830, and the declarant's purpose, *id.* at 822 n.1. This inconsistency within *Hammon* has been the subject of ongoing

controversy and litigation in state and lower federal courts.[9]

This definition is also unworkable because an examination of either a declarant's or interrogator's purpose depends, even under an objective standard, on a court's subjective attribution of primacy among the multiple motives inevitably associated with any given declaration. *See Hammon*, 547 U.S. at 839-40 (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that "a hierarchy of purpose . . . will rarely be present" and that a "determination as to the 'primary purpose' of a particular interrogation would be unpredictable"). Thus, the *Hammon* primary purpose definition suffers the same

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[9] This inconsistency has produced at least five approaches Some courts have adopted the view that the *Hammon* definition requires examination of the declarant's purpose. *See, e g., United States v. Johnson*, 581 F.3d 320, 325 (6th Cir. 2009), *cert denied*, 130 S. Ct. 3409 (2010). Other courts examine the questioner's purpose. *See, e.g., United States v Caraballo*, 595 F.3d 1214, 1229 (11th Cir. 2010) Many courts, particularly in child sexual abuse cases, have identified a third possibility – the purpose of the questioning *See, e g., Coronado v. State*, 310 S W 3d 156, 163 (Tex App. 2010, pet. granted). As a fourth option, some courts have concluded that both purposes are relevant to determining whether a statement was testimonial *See, e.g , State v. Franklin*, 308 S.W.3d 799, 817-18 (Tenn. 2010), *petition for cert filed*, No. 10-5746 (July 28, 2010) Finally, at least one jurisdiction has concluded that for statements that result from police interrogation, the police officer's purpose is examined, but for all other statements, the declarant's purpose is examined. *In re Rolandis G.*, 902 N.E.2d 600, 610 (Ill 2008), *cert denied*, 129 S. Ct 2747 (2009).

flaw as the *Roberts* reliability test: it is based on the amorphous, unpredictable interpretation of subjective criteria. *See Crawford*, 541 U.S. at 62.[10]

As troubling as the unpredictability of the *Roberts* test was, the Court in *Crawford* considered its "fatal flaw" to be its ability to result in admission of statements clearly intended to be excluded by the Confrontation Clause. *Id.* The *Hammon* primary purpose definition suffers from a similar fatal flaw – its ability to result in the exclusion of statements the Framers did not intend to be excluded under the Confrontation Clause. *See Salinger v. United States*, 272 U.S. 542, 548 (1926) (observing that the Framers' purpose was not to broaden the common-law right of confrontation "or disturb the exceptions" existing at the time of founding). For example, the Court in *Crawford* recognized authority for admitting dying declarations, *id.* at 56 n.6, and the Court said over a century ago that "no one would have the hardihood at this day to question their admissibility." *Mattox*, 156 U.S. at 243-44. In spite of this authority, a dying declaration made to a police officer likely meets the *Hammon* primary purpose definition of a testimonial statement.

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[10] For concrete examples of the *Hammon* test's unpredictability and subjectivity, see *People v. Bryant*, 768 N.W.2d 65, 71-75 (Mich. 2009) (4-3 decision reversing the intermediate appellate court based on a different interpretation of the facts), *cert granted*, 130 S. Ct. 1685 (2010), and *State v. Basil*, 998 A.2d 472, 492 (N.J. 2010) (no majority opinion).

This Court seemed to suggest in *Crawford* that the solution to the dying declaration dilemma is simply to provide for an exception. 541 U.S. at 56 n.6. Yet, "the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'" *Giles*, 554 U.S. at 375. In other words, the fact that *Hammon*'s primary purpose definition requires exceptions to remain true to the Framer's intent heightens its uncertainty and unpredictability.

More importantly, the need for exceptions to the *Hammon* definition is but a symptom of its more serious flaw – that the definition is inconsistent with the purpose of the Confrontation Clause outlined in *Crawford*. That purpose is to prevent the abusive practice at common law of the use at trial of testimony provided by prosecuting witnesses during post-accusation, pre-trial *ex parte* judicial examinations. 541 U.S. at 43. Indeed, the Court has described the limited application of the Confrontation Clause to testimonial hearsay as "not merely" the "'core'" of the confrontation right, "but its perimeter." *Davis*, 547 U.S. at 824. Yet, *Hammon* establishes a definition of testimonial that applies the confrontation right to statements made under circumstances beyond the kind of *ex parte* judicial examinations that prompted the adoption of the Confrontation Clause.

2. Under *Crawford*, there is one certainty in the meaning of testimonial: a statement made in judicial proceedings under oath is, by definition, the testimony of a witness. *See Crawford*, 541 U.S. at 51; *id.*

at 71 (Rehnquist, C.J., concurring in the judgment); *see also* Black's Law Dictionary 1740 (9th ed. 2009). In addition, the Court has applied an exclusionary rule to certain unsworn testimonial statements, such as custodial interrogations; after all, Lord Cobham's examination was, like other Marian examinations of suspects, unsworn. *See Crawford*, 541 U.S. at 52 & n.3.

To be consistent with the Confrontation Clause's adversarial goals, the definition of testimonial must capture sworn and unsworn adversarial and inquisitorial statements without suffering from the flaw in *Roberts* of under-inclusiveness and the flaw in both *Roberts* and *Hammon* of over-inclusiveness. It must also be administrable. When combined with *Crawford*'s focus on statements taken by adversarial government officers, *Inadi* satisfies these requirements.

In *Inadi*, reliability under *Roberts* was "not at issue." *Inadi*, 475 U.S. at 391 n.3. Rather, the Court addressed whether *Roberts* required a showing of unavailability for all hearsay statements, and more specifically for co-conspirator statements, before permitting their admission at trial. *Id.* at 392. The Court distinguished between two types of statements. The first category, which includes former testimony, "often is only a weaker substitute for live testimony." *Id.* at 394. The second category, however, differs from the first in that its evidentiary significance comes from a "context that cannot be replicated, even if the declarant testifies to the same matters in court." *Id.*

at 395. A co-conspirator statement "often will derive its significance from the circumstances in which it was made. . . . Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy." *Id.* The context of a co-conspirator statement makes it "irreplaceable as substantive evidence." *Id.* at 396. For this reason, unavailability is required only for the first category of statements. *Id.*

Inadi's pre-*Crawford* limitation on the requirement of unavailability for statements made outside of judicial proceedings foreshadowed *Crawford*'s limitation of the Confrontation Clause to testimonial statements; *Inadi* effectively set out a definition of testimonial before the term came to define the scope of the right. As the Court determined in *Inadi*, it would be "'clear folly'" to interpret the Confrontation Clause in a manner that excludes statements bearing independent evidentiary significance. 475 U.S. at 396 (quoted authority omitted); *accord White*, 502 U.S. at 356 ("To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness . . . ."). There is no prophylactic justification for expanding the Confrontation Clause beyond formal "witnesses" when a statement's context provides evidentiary significance apart from its content. Such statements do not substitute for live testimony.

Under *Inadi*, the *jury*, not a judge, determines the trustworthiness of an out-of-court statement. The

judge merely determines whether a statement is a substitute for live testimony or something other than testimony. A judge need only make a routine gatekeeping assessment of the relevance of a statement's context, and *Inadi* provides the test for relevance: whether a statement's evidentiary value can be replicated by in-court testimony or, instead, whether a statement's context is irreplaceable.

Although the Court has not previously described the scope of the Confrontation Clause in these express terms, the Court's holdings hew closely to this line. A statement under oath, such as an affidavit, a deposition, preliminary hearing testimony, or grand jury testimony, has no independent evidentiary significance and serves the same role as trial testimony. Some statements not made under oath, such as custodial interrogations, also serve the same role as trial testimony.

Other unsworn statements, however, are important to the truth-seeking function of a trial based on the circumstances in which they are made. The Court has found no Confrontation Clause violation in the admission at trial of (1) the post-charge co-conspirator statement to a cellmate in *Dutton v. Evans*, 400 U.S. 74, 77, 87-89 (1970) (plurality opinion), (2) the unwitting co-conspirator statements to the police in *Bourjaily* and *Inadi*, (3) the excited utterances by a victim to a relative and to a police officer during a preliminary investigation in *White*, 502 U.S. at 350-51, 355-56, (4) a further statement by the victim in *White* to a nurse and a physician for

purposes of medical treatment, *id.*, and (5) the statement by the victim in *Davis* during an ongoing emergency. The Court has also repeatedly endorsed dying declarations. *See Pointer*, 380 U.S. at 407; *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Kirby*, 174 U.S. at 61; *Mattox*, 156 U.S. at 243-44. The common thread in these cases is that, regardless of whether the statements were made to or in the presence of a police officer, the statements had independent evidentiary significance within the meaning of *Inadi* and did not simply substitute for live testimony. *See Davis*, 547 U.S. at 828 ("No 'witness' goes into court to proclaim an emergency and seek help."); *White*, 502 U.S. at 356 ("[T]he out-of-court statements admitted in this case had substantial probative value that could not be duplicated simply by the declarant later testifying in court."); *see also Crawford*, 541 U.S. at 74 (Rehnquist, C.J., concurring in the judgment) (observing that reasons similar to those expressed in *Inadi* "justify the introduction of spontaneous declarations, statements made in the course of procuring medical services, dying declarations, and countless other hearsay exceptions") (citations omitted).[11]

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[11] The facts in *Idaho v. Wright*, 497 U.S. 805 (1990), do not reveal whether the child's statements to a physician in response to leading questions would qualify as testimonial. To the extent *Wright* can be read as inconsistent with *Inadi*'s (or even *Hammon*'s) definition of testimonial, the Court's opinion is easily explained by *Roberts*' application of the Confrontation Clause to all hearsay rather than the testimonial statements of witnesses against the accused. *See Whorton*, 549 U.S. at 420. Even if the

(Continued on following page)

Inadi provides a definition of testimonial with a close fit to the procedural purposes of the Confrontation Clause identified in *Crawford*. To further the adversarial focus of the Clause and the prophylactic effect of its exclusionary rule, a testimonial statement should be defined as a statement to a prosecuting or judicial officer that has no "independent evidentiary significance of its own." *Inadi*, 475 U.S. at 394.

Under this definition, the report in this case is nontestimonial. It contains the contemporaneous recording by a public official under a non-adversarial public duty to make an observation.[12] The laboratory conditions and duty to observe could not have been

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statements in *Wright* were nontestimonial, their unreliability may still be addressed by hearsay rules and due process protections

[12] Petitioner (Br. 12, 34) and Professor Friedman (Friedman Br. 15) refer broadly to declarants who make observations without recognizing the distinction between testimonial and nontestimonial statements of observation. A declarant's recollection of a randomly observed license plate number differs from a contemporaneous recording made under a non-adversarial public duty *See Orozco*, 590 F.2d at 793 (discussing "the simple recordation of license numbers of all vehicles which pass [the law enforcement officer's] station"). *Melendez-Diaz* did not involve a public duty to make an observation; the law at issue instead imposed a public duty to prepare an affidavit. *See* 129 S. Ct. at 2532. A public duty to testify does not make the testimony a public record In the same way as a public official's appearance as a witness at trial, the public official's affidavit in *Melendez-Diaz* served an adversarial role, and the context of the affidavit's preparation provided no evidentiary significance beyond its content.

replaced by live testimony. "Witnesses" do not perform scientific tests in a laboratory, and scientists do not go into court to make a contemporaneous recording of their results.

II. EVEN IF THE REPORT IS TESTIMONIAL, ADMISSION OF THE REPORT WITHOUT THE ANALYST'S APPEARANCE AT TRIAL DID NOT DEPRIVE PETITIONER OF THE RIGHT OF CONFRONTATION.

A. The opportunity to confront machine-generated raw data by retesting is at least equivalent to cross-examination as a means of in-trial confrontation.

The text of the Sixth Amendment states that an accused has the right to be "confronted with the witnesses against him." U.S. Const. amend. VI. It does not state that an accused has the right to confront witnesses *only* through cross-examination. *See California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring). Cross-examination is a mechanism for confrontation. *See Crawford*, 541 U.S. at 61. But it is not the only mechanism. When the evidence at issue is raw data, the opportunity for retesting is equivalent to the opportunity to cross-examine required under *Crawford*. *Cf. Ash*, 413 U.S. at 319 (determining that the opportunity to repeat a photographic lineup "fully satisfies the historical spirit of the Sixth Amendment's counsel guarantee");

Gilbert v. California, 388 U.S. 263, 267 (1967) (similar for a handwriting exemplar).[13]

As Amici Law Professors recognize, Profs. Br. 11-12, *Crawford* itself acknowledged one permissible substitute for in-trial confrontation: admission of out-of-court testimony when the witness is unavailable and the defendant has had a prior opportunity for cross-examination. 541 U.S. at 54. Such a substitute is permissible because certain adversarial protections of confrontation, such as the need for a jury to observe a witness's demeanor, "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 243.

In *Ash*, the Court recognized that certain procedures can "cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant." 413 U.S. at 315. Such procedures include "accurate reconstruction" of the confrontation. *Id.* at 316. Likewise, accurate reconstruction of the making of an out-of-court statement can cure the accused's inability to confront the statement when it is made. Although accurate reconstruction is often not possible, particularly for statements by a person, it is possible when the statement is raw data or a mere

[13] The Court's mention of the ability to cross-examine an expert at trial in *Gilbert* does not assist in resolving this case because the right of confrontation was not at issue and the Court did not distinguish between adversarial and non-adversarial scientific testing or between subjective expert opinions and objective scientific observations capable of reconstruction.

transcription of raw data onto a public record. The opportunity for retesting fulfills the role of cross-examination by fully exposing grounds, if any exist, for the jury to dismiss the evidence as unreliable or untrustworthy. Indeed, retesting satisfies the goals of cross-examination advanced by Petitioner (Br. 16-17) by providing an opportunity to test (1) the analyst's recollection, (2) the analyst's veracity, (3) ambiguity in the result, (4) the analyst's skill, and (5) any transposition in the transcription. Therefore, the adversarial protection of the Confrontation Clause is satisfied by the "possibility of perfect reconstruction" through retesting of the blood sample. *Ash*, 413 U.S. at 319 n.13.

Indeed, retesting is a more effective means of confrontation than mere cross-examination. Given the manner in which laboratories conduct chemical analyses – in large batches with individual samples identified by number for scientific control purposes[14] – it is nearly certain that a testing analyst will not be able to distinguish one blood sample from another or remember a particular test from a particular day. As a result, cross-examination of the analyst to expose errors in the testing or transcription rarely, if ever, yields fruit. Yet, if such errors occurred, retesting is certain to reveal the truth. Retesting, therefore, is not merely a substitute for confrontation or an alternative "trial strategy" as indicated in *Melendez-Diaz*,

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[14] Scientific Lab. Div, N.M. Dep't of Health, *Scientific Laboratory Division Fall/Winter News* 2 (2010), http://www.sld.state.nm.us/documents/SLD2010FallWinter.pdf

129 S. Ct. at 2536 (acknowledging that retesting may be more effective than cross-examination). Instead, it is a method of confrontation that is equivalent, if not superior, to cross-examination.

For that reason, the unavailability requirement of *Crawford* is inapplicable when scientific results may be confronted by retesting. Substitutes for in-trial confrontation are based on a rule of necessity. *Mattox*, 156 U.S. at 243; *Barber v. Page*, 390 U.S. 719, 722 (1968). Unavailability is required to justify substituting prior cross-examination for in-trial confrontation because the in-trial confrontation is "the better evidence. But if the declarant is unavailable, no 'better' version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point." *Inadi*, 475 U.S. at 394-95. Conversely, when another means of in-trial confrontation is not just a "second-best" mechanism for confrontation (Profs. Br. 12, 15) but the equivalent of cross-examination, there is no necessity for the unavailability requirement.

Moreover, contrary to the Professors' proposed test (Profs. Br. 11), the Confrontation Clause does not place the burden on the government to confront prosecution witnesses on the defendant's behalf. *See Melendez-Diaz*, 129 S. Ct. at 2541 (discussing notice-and-demand statutes). Because retesting is equivalent to cross-examination as a mechanism for in-trial confrontation, a defendant is not denied the right to confrontation when he has the opportunity to retest but chooses not to do so, any more than he is denied

the right when he chooses not to cross-examine a witness at trial. After all, the Confrontation Clause assures a defendant the opportunity to confront witnesses, *see United States v. Owens*, 484 U.S. 554, 559 (1988), an opportunity the defendant may waive, *see Brookhart v. Janis*, 384 U.S. 1, 4-5 (1966). Petitioner had an opportunity to confront the test result through retesting. Therefore, the transcription of the test result was admissible, even if it is considered testimonial.

B. A witness with knowledge of laboratory procedures and the functioning of the machine testified at trial and was cross-examined.

Unlike in *Melendez-Diaz*, an analyst with the Department of Health appeared at trial in this case. As a result, Petitioner had a complete opportunity to question the witness about his testimony on the laboratory procedures printed by the Department of Health on the back of the report (JA 49-56), the functioning and accuracy of the gas chromatograph (JA 54), and the foundation for admitting the report as a public or business record (JA 51). Together with the opportunity for retesting, this opportunity for cross-examination satisfied the adversarial requirements of the Confrontation Clause.

Petitioner (Br. 31) argues that he should have been able to probe the testing analyst's credibility, but the same argument could be made about any public

official responsible for a public record. The reality is that such individuals do not remember any single one of the numerous routine observations made on a daily basis in their official capacity, and their testimony at trial would consist of their review of the document. *Cf. Dutton*, 400 U.S. at 89 (plurality opinion) ("[T]he possibility that cross-examination . . . could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal."). Petitioner also argues that cross-examination might have shown the analyst transposed the numbers on the machine. Br. 34. Aside from the fact that the result in this case would have been inculpatory regardless of such a transposition (.21 or .12), the same argument could be made about any copyist.

The right of confrontation does not provide for an ideal attack on evidence mounted by the most skilled counsel, as Petitioner seems to propose. There may arguably be an incidental benefit to cross-examining all public officials about the records they make or all copyists about their transcriptions. But "[t]he law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox*, 156 U.S. at 243. Our adversarial system provides other protections, including the right to compel witness testimony, *see Inadi*, 475 U.S. at 397-98, discovery, and the requirement that prosecutors disclose exculpatory or impeaching evidence, such that the absence of an incidental aspect of confrontation would not, as Petitioner suggests (Br. 12, 31), "prevent[ ]" him from

discovering favorable evidence or "shield potentially damning information." Indeed, Petitioner used a common and effective means of challenging evidence by attacking the results of the test through closing argument. JA 61; *see Manocchio*, 919 F.2d at 781 & n.20 (noting that argument of defense counsel and compulsory process minimize any risk of prosecutorial abuse); *cf. Owens*, 484 U.S. at 560 (referring to "realistic weapons" to attack evidence other than successful cross-examination such as "defense counsel's summation").

Petitioner contends that witnesses cannot testify beyond their personal knowledge.[15] Br. 31. This contention, like Professor Friedman's position on Evidence Rule 703 (Friedman Br. 12 n.8), would virtually bar experts for the prosecution because it disregards both the nature of expert testimony and the long-understood notion that "[n]o one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths." 1 John Henry Wigmore,

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[15] The term "surrogate" is far too imprecise. Any witness testifying to the hearsay of another, whether testimonial or nontestimonial, could be considered a surrogate lacking the declarant's personal knowledge. Surrogacy could also include an employee or records custodian testifying on behalf of an entity that can only appear at trial through its agents. The witness in the present case, Mr. Razatos, was not a surrogate. Aside from reading a report that was introduced as an exhibit (JA 55), Mr. Razatos offered no opinion about Petitioner's blood alcohol content and did not purport to testify to the personal knowledge of the testing analyst.

Evidence § 665 (1904). The fair administration of criminal justice cannot tolerate such overwhelming burdens for the mere whisper of a benefit Petitioner advocates. *See* States' Amici Br.

With respect to Petitioner's argument that an expert cannot be a mere conduit for another expert's opinion, the New Mexico Supreme Court so held in the companion case of *State v. Aragon*, 225 P.3d 1280, 1290-91 (N.M. 2010). The state court's ruling in the present case does not permit conduit testimony; instead, it properly holds that Petitioner's right of confrontation was adequately protected.

III. IF THE TRIAL COURT ERRED IN ADMITTING THE REPORT, OR ANY PART OF THE REPORT, THE ERROR WAS HARMLESS.

Confrontation Clause errors are subject to a harmless error inquiry, *see Davis*, 547 U.S. at 829, a question raised but not resolved in the state court. New Mexico recognizes two independent means of proving intoxication, one based on impairment and one based on alcohol concentration in the breath or blood (*per se*). N.M. Stat. Ann. § 66-8-102(A), (C) (2010). Contrary to Petitioner's statement of the case (Br. 2, 3, 8), the trial court did not instruct the jury on *per se* DWI (R. 75-76), and the State introduced a great deal of evidence beyond the report to show that Petitioner drove while impaired. Further, Petitioner's aggravated blood alcohol level did not affect his sentence as a fifth-time DWI offender. *See* N.M. Stat.

Ann. § 66-8-102(H). Therefore, if there was any error in admitting the report, Respondent asks this Court to remand to the state court to determine in the first instance whether the error was harmless beyond a reasonable doubt. *See Melendez-Diaz*, 129 S. Ct. at 2542 n.14.

CONCLUSION

For the foregoing reasons, the judgment of the New Mexico Supreme Court should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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DONALD BULLCOMING,

Petitioner,

v.

NEW MEXICO,

Respondent.

On Writ of Certiorari
to the New Mexico Supreme Court

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559
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

ARGUMENT 2

I. Caylor's Assertions In The Forensic Report Are Testimonial 2

II. The State's Failure To Call Caylor To The Stand At Trial Violated The Confrontation Clause's Particular-Witness Rule 6

A. A Defendant's Opportunity To Retest A Forensic Sample Does Not Satisfy The Right To Confrontation 7

B. The Ability To Cross-Examine One Witness Does Not Give The Prosecution License To Introduce A Different Witness's Testimonial Statements 9

C. Evidentiary Rules Governing Expert Testimony Do Not Override The Confrontation Clause With Respect To Testimonial Statements That The Prosecution Introduces At Trial 12

D. Any Burden That The Confrontation Clause Imposes In This Context Does Not Justify Dispensing With Confrontation 17

CONCLUSION 24

TABLE OF AUTHORITIES

Cases:

Blakely v. Washington, 542 U.S. 29 (2004) 18
Briscoe v. Virginia, 130 S. Ct. 131 (2010) 19
Contreras v. State, 939 N.E.2d 708 (Ind. Ct. App. 2010) 21
Coy v. Iowa, 487 U.S. 1012 (1988) 18
Crawford v. Washington, 541 U.S. 36 (2004) ..... passim
Davis v. Washington, 547 U.S. 813 (2006) 3, 4, 5, 14
Gideon v. Wainwright, 372 U.S. 33 (1963) 18
Hamilton v. State, 300 S.W.3d 14 (Tex. Ct. App. 2009) 21
Heike v. United States, 227 U.S. 131 (1913) 6
Mattox v. United States, 156 U.S. 23 (1895) 10
Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) ..... passim
Michigan v. Bryant, No. 09-150 5
Pendergrass v. State, 913 N.E.2d 703 (Ind. 2009), *cert. denied*, 130 S. Ct. 3409 (2010) 21
People v. Goldstein, 843 N.E.2d 727 (N.Y. 2005) 16
Taylor v. Illinois, 484 U.S. 400 (1988) 8
Tennessee v. Street, 471 U.S. 409 (1985) 15, 16
United States v. Heike, 192 F. 83 (2d Cir. 1911) 6
United States v. Johnson, 587 F.3d 625 (4th Cir. 2009) 15

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) 15
United States v. Washington, 498 F.3d 225 (4th Cir. 2007) 16, 17

Rules and Statutes:

Fed. R. Evid. 703 ..... 13, 14
N.M. Admin Code § 7.33.2.15(A)(406) 22
N.M. R. Evid. 11-703 13
N.M. Mag. Ct. R. P. 6-607 4
N.M. Mun. Ct. R.P. 8-603 4
N.M. Stat. § 29-3-4 3
N.M. Stat. § 66-8-102(D)(1) 23

Other Authority:

Haggan, Patrick M., Chief Trial Counsel, Suffolk Cnty. Dist. Attorney's Office, Remarks at New England School of Law Symposium: Confronting Forensic Evidence: Implications of *Melendez-Diaz v. Massachusetts* and *Briscoe v. Virginia* (Nov. 13, 2009) 19
Kaye, David H., et al., The New Wigmore, A Treatise On Evidence: Expert Evidence (2d ed. 2011) 15, 16
Seaman, Julie A., *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Geo. L.J. 827 (2008) 16

REPLY BRIEF FOR PETITIONER

This is not a complicated case. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that, absent a declarant's unavailablity and a prior opportunity for cross-examination, the prosecution may not introduce the declarant's testimonial statements into evidence without putting the declarant on the stand. And in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), this Court held that assertions in forensic lab reports are testimonial statements. Yet here, even though Curtis Caylor was never deemed unavailable and the defendant never had a prior opportunity to cross-examine him, the prosecution introduced Caylor's assertions in a forensic lab report without putting him on the stand. This constituted a straightforward violation of the Confrontation Clause.

The State's brief attempts to salvage the judgment below on various grounds – all but three pages (Resp. Br. 56-59) of which ignore, or flatly contradict, the New Mexico Supreme Court's reasoning. But all of the State's new arguments run squarely counter to *Melendez-Diaz* and other basic confrontation principles.

Even less persuasive are amici's arguments based on invoking expert-witness rules, introducing machine-generated printouts, and the prospects of calling multiple forensic witnesses to the stand or prosecuting "cold cases." This case involves none of those things. Rather, it involves the prosecution electing to introduce one analyst's forensic report, describing procedures he allegedly followed and

results he allegedly obtained, through the in-court testimony of another analyst. Petitioner does not contend that the State needed to present any extra witnesses; it merely needed to present the *right* witness – and that witness was perfectly available. If *Melendez-Diaz* means anything, the decision below must be reversed.

ARGUMENT

I. Caylor's Assertions In The Forensic Report Are Testimonial.

In *Melendez-Diaz*, law enforcement officers provided seized evidence "to a state laboratory required by law to conduct chemical analysis upon police request." 129 S. Ct. at 2530. Lab analysts tested the evidence and prepared "certificates of analysis" reporting that the evidence contained an illegal substance. *Id.* at 2531. This Court held that the certificates contained testimonial statements because each statement was "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact" in a criminal prosecution. *Id.* at 2532 (internal quotation marks and citation omitted).

This Court granted certiorari in this case based on the premise that the certificate at issue here is likewise testimonial. Pet. for Cert. i. The State nevertheless argues that the lab report here is nontestimonial because: (1) it was "unsworn"; (2) it was supposedly "non-adversarial"; and (3) Caylor's statements allegedly simply reported machine-generated results. None of these arguments provides the slightest basis for distinguishing *Melendez-Diaz*.

1. As the New Mexico Supreme Court recognized, "'the absence of [an] oath [i]s not dispositive' in determining if a statement is testimonial." JA 12 (quoting *Crawford*, 541 U.S. at 52). Indeed, this Court has called it "implausible that a provision which concededly condemn[s] trial by sworn *ex parte* affidavit [would deem] trial by *unsworn ex parte* affidavit perfectly OK." *Crawford*, 541 U.S. at 52-53 n.3. Such a rule would render the right to confrontation so easily manipulated as to be meaningless. *See Davis v. Washington*, 547 U.S. 813, 830-31 n.5 (2006); *id.* at 838 (Thomas, J., concurring in the judgment in part and dissenting in part) ("Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through the use of *ex parte* statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process.").

Here, the lab report is identical to those in *Melendez-Diaz* in all material respects. Just as in *Melendez-Diaz*, a law enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations. Resp. Br. 23; N.M. Stat. § 29-3-4. Just like the analysts in *Melendez-Diaz*, Caylor tested the evidence and prepared a "certificate of analyst" reporting that it contained a certain chemical composition. JA 62. Just like the certificate in *Melendez-Diaz*, Caylor's certificate is "formalized into [a] signed document[]," *Davis*, 547 U.S. at 837 n.2 (Thomas, J., concurring in the judgment in part and dissenting in part), called a "report." JA 62. Finally, the report notes at the bottom that it is an official form approved by the New Mexico Rules of Criminal Procedure for use as

evidence in criminal trials. *Id.*[1] These formalities are more than enough to render Caylor's assertions testimonial under any standard. In fact, the absence of an oath makes his report *more* offensive to the Confrontation Clause, not less.

2. The holdings of *Melendez-Diaz* and *Crawford* squarely foreclose the State's argument (Resp. Br. 21-41) that Caylor's assertions in the lab report are nontestimonial because they are somehow not "adversarial" or "inquisitorial." Any document that is created for an "evidentiary purpose," or to aid the investigative or prosecutorial process, is testimonial. *Melendez-Diaz*, 129 S. Ct. at 2532. It is irrelevant whether such statements are made to government officers who are supposedly "neutral." *Melendez-Diaz*, 129 S. Ct. at 2533-34, 2536; *Crawford*, 541 U.S. at 66. (Indeed, governmental officers need not even be involved in the creation of such statements; purely "volunteered" statements can be testimonial. *Davis*, 547 U.S. at 822-23 n.1; *accord Melendez-Diaz*, 129 S. Ct. at 2535.) The lab report easily satisfies this "evidentiary purpose" test. Just like the report in *Melendez-Diaz*, the report here was created by employees in a state department of health in order to

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[1] Although part of the text on the bottom of the report is obscured in this case by an appendix sticker, it reads in full: "SLD 705 (Rules of Procedure for the Municipal Courts, Rule 8-603, Rules of Procedure for the Magistrate Courts, Rule 6-607, Rules of Procedure for . . . ." The rules referenced in the parenthetical provide for the automatic admissibility of certified reports of blood alcohol analyses. SLD 705 is adopted from N.M. CR Form 9-505.

aid a police investigation. *Compare Melendez-Diaz*, 129 S. Ct. at 2530-32, *with* JA 62.[2]

3. *Melendez-Diaz* likewise forecloses the State's argument that "the simple act of copying raw data onto a public record" cannot create testimonial evidence. Resp. Br. 18. When someone "*create[s]* a record for the sole purpose of providing evidence against a defendant," the record is testimonial. *Melendez-Diaz*, 129 S. Ct. at 2539 (emphasis in original). It does not matter whether the record reflects that person's "interpretation" or "judgment." Resp. Br. 16. If it did, then contrary to the reasoning in *Melendez-Diaz*, 129 S. Ct. at 2535, 2538, police reports concerning objective observations (such as addresses or license plate numbers) would be nontestimonial, as would all eyewitness reports of objective facts to the police or prosecutors.

Nor does it matter whether a record can be characterized as a "public or business record" under

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[2] Recognizing, at least in part, that this Court's precedent forecloses its argument, the State asks this Court to overrule *Davis*, suggesting that the "primary purpose" test that an eight-Justice majority adopted in that case has created "controversy and litigation in the state and lower federal courts." Resp. Br. 44. This Court's upcoming decision in *Michigan v. Bryant*, No. 09-150, presumably will clarify aspects of the *Davis* test. At any rate, this Court fully expected that *Crawford* would generate some "interim uncertainty," 541 U.S. at 68 n.10, and that is perfectly natural. Whereas this Court has been applying criminal procedure rights such as the right to counsel and the right against self-incrimination against the states for over 40 years, this Court has applied the traditional conception of the Confrontation Clause against the states for only seven years.

modern hearsay rules. Resp. Br. 18-19. The shop books that the State points to in *Heike v. United States*, 227 U.S. 131, 144-45 (1913), which contemporaneously recorded the amount of sugar a company bought and sold, were nontestimonial not because they were business records but because they were unconnected to any evidentiary objective. *See United States v. Heike*, 192 F. 83, 95-97 (2d Cir. 1911); *compare Melendez-Diaz*, 129 S. Ct. at 2538.

In any event, as petitioner explained in his opening brief, Caylor's statements in the lab report went well beyond copying down what the gas chromatograph supposedly said. Petr. Br. 36-37. The State does not dispute this reality, offering instead only the tepid suggestion that petitioner did not object to the admission of the additional statements concerning the integrity of the sample and its connection to him. Resp. Br. 18 n.1. Petitioner, however, objected below to introducing Caylor's statements in the "document," JA 44 – that is, all of Caylor's statements – not just his statements asserting that the BAC of the blood sample was .21. There can be no doubt, therefore, that the State introduced testimonial statements from Caylor.

II. The State's Failure To Call Caylor To The Stand At Trial Violated The Confrontation Clause's Particular-Witness Rule.

The State argues that its introduction of Caylor's statements in the forensic lab report without putting Caylor on the stand comported with the Confrontation Clause for two reasons: (A) petitioner had the opportunity to retest the blood sample for himself; and (B) petitioner was able to cross-examine

a different analyst, Gerasimos Razatos, who had general "knowledge of laboratory procedures." Resp. Br. 52-59. The State's amici advance two more arguments, contending that the State did not need to put Caylor on the stand because (C) the rules of evidence allow a party to introduce otherwise inadmissible evidence in support of an "expert witness" giving in-court opinion testimony, Br. of NDAA 8-13; Br. of States 24-27; and (D) the Confrontation Clause is overly burdensome as applied to forensic evidence, Br. of NDAA 22-32; Br. of States 5-12; Br. of N.M. Dep't of Health 26-33. None of these arguments withstands scrutiny.

A. A Defendant's Opportunity To Retest A Forensic Sample Does Not Satisfy The Right To Confrontation.

The State argues that an opportunity for retesting satisfies the Confrontation Clause because (1) "the Confrontation Clause does not place the burden on the government to confront witnesses on the defendant's behalf," Resp. Br. 55; and (2) retesting, according to the State, is a "more effective" way to challenge the prosecution's forensic evidence than cross-examination, *id.* at 54-55. *Melendez-Diaz* squarely forecloses each of these contentions.

1. In *Melendez-Diaz*, Massachusetts argued that no confrontation violation occurred "because the [defendant] had the ability to subpoena the analysts." 129 S. Ct. at 2540. This Court rejected the argument, explaining that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses . . . . Its value to the defendant is not replaced by a system in which the prosecution

presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses." *Id.*; *see also Taylor v. Illinois*, 484 U.S. 400, 410 n.14 (1988) (Confrontation Clause's requirement of live testimony applies "in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own."). So too here. The obligation that the Confrontation Clause imposes on the prosecution to present evidence from its witnesses via "live testimony in court," *Crawford*, 541 U.S. at 43, runs independent of any ability the defendant has, via retesting or any other means besides confrontation, to challenge the testimony that the prosecution offers.

2. It makes no difference whether retesting a sample described in a forensic report would sometimes be a more effective way of challenging a report than is confrontation. As this Court recognized in *Melendez-Diaz*, "respondent and the dissent may be right that there are other ways – and in some cases better ways – to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available." 129 S. Ct. at 2536. Thus, just as the prosecution must call an investigating police officer to the stand even when a defendant's ability to inspect a crime scene for himself might be a more effective way of challenging objective assertions in the officer's report, the prosecution must call a forensic analyst to the stand regardless of whether retesting is possible.

B. The Ability To Cross-Examine One Witness Does Not Give The Prosecution License To Introduce A *Different* Witness's Testimonial Statements.

The State does not dispute that its refusal to call Caylor to the stand violated three of the four elements of the right to confrontation – namely, the requirements that witnesses provide their testimony under oath, in the presence of the jury, and face-to-face with the accused. *See* Petr. Br. 15-22, 23-24. Nor does the State dispute that its refusal to call Caylor to the stand at least partially deprived petitioner of the fourth element of confrontation (cross-examination). In particular, the State's action rendered petitioner unable to cross-examine Caylor about the testing he claimed he performed; about his familiarity and proficiency with gas chromatograph testing; and – perhaps most importantly – about his work history, including the reason for his recently being put on unpaid leave. *See* Petr. Br. 28-32.

The State nonetheless argues that it satisfied the Confrontation Clause because it partially fulfilled the requirement of cross-examination. Specifically, the State contends that it satisfied the Clause insofar as petitioner had an "opportunity to question" a *different* analyst about general "laboratory procedures." Resp. Br. 56-57. The State is mistaken. Giving a defendant the ability to cross-examine one witness cannot substitute for the prosecution's obligation to confront the defendant with another witness whose testimonial statements it introduces.

1. Both the history of the Confrontation Clause and this Court's decision in *Crawford* make clear

that, absent a declarant's unavailablity and a prior opportunity for cross-examination, the Clause imposes a categorical rule: the prosecution may not introduce the declarant's testimonial statements into evidence without putting *that declarant* on the stand. *See* Petr. Br. 13-15, 23-25. Just like the Sixth Amendment's rights to counsel and to jury trial, this constitutional rule is not subject to suspension based on a court's perception that confrontation of a particular witness would provide little value in any given case. *See Crawford*, 541 U.S. at 61-62; *Melendez-Diaz*, 129 S. Ct. at 2536, 2537 n.6. It is always the defendant's prerogative, not a court's, to decide whether it is worth invoking constitutional protections.

2. The State and its amici seek refuge from this reality in two snippets of this Court's case law. But neither passage offers any help.

a. The State points to this Court's statement in *Mattox v. United States*, 156 U.S. 237, 243 (1895), that "[t]he law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *See* Resp. Br. 57. But *Mattox* stands for just the opposite of what the State would have it embody. There, this Court allowed the prosecution to introduce prior testimony only when a witness was unavailable. 156 U.S. at 240. And even then, this Court emphasized – consistent with historical requirements – that the defendant "shall under no circumstances be deprived of" the right at least once "of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 244. Here, Caylor was not unavailable, and petitioner

never had a chance to confront and cross-examine him. Nor does the State even attempt to argue that there is any historical basis for dispensing with those requirements here.

b. The NDAA points to footnoted language in *Melendez-Diaz*, 129 S. Ct. at 2532 n.1, which explains that the prosecution need not call to the stand everyone "whose testimony may be relevant in establishing the chain of custody" of a forensic sample, for "[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence." *See* Br. of NDAA 14-15, 32. When read in its entirety, however, this footnote directly refutes the New Mexico Supreme Court's holding.

The footnote reaffirms that the Confrontation Clause imposes nothing more, but also nothing less, than a "procedural" requirement regarding prosecution witnesses. *Crawford*, 541 U.S. at 61. The prosecution always has discretion (subject to applicable evidence rules and its burden to prove each element of the crime) to decide which witnesses it puts on the stand to prove a chain of custody or anything else. Thus, the footnote makes clear that nothing in the Confrontation Clause requires the prosecution to call "everyone who laid hands on the evidence" that is the subject of a forensic report. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

At the same time, this Court emphasized in the footnote that "what testimony *is* introduced must (if the defendant objects) be introduced live." *Id.* (emphasis in original). The word "testimony" in this sentence obviously encompasses not merely in-court testimony but rather *any* testimonial evidence. (Otherwise, the sentence would be nothing more than

a truism.) Hence, once the prosecution elects to introduce a certain forensic analyst's testimonial statements, it must put that analyst on the stand. *See id.* at 2537 n.6 ("The analysts who swore the affidavits" the prosecution introduced "provided testimony against [the defendant], and they are therefore subject to confrontation.").

The State violated that rule here. In order to introduce Caylor's report, the State needed to put Caylor on the stand. If the State wanted Razatos to testify instead, it could have had him retest the portion of petitioner's blood sample that the lab retained after Caylor's testing, *see* JA 52, 65, and write a new report. But the Confrontation Clause prohibited the State from introducing *Caylor's* report through *Razatos's* in-court testimony.

C. Evidentiary Rules Governing Expert Testimony Do Not Override The Confrontation Clause With Respect To Testimonial Statements That The Prosecution Introduces At Trial.

The State's amici contend that Caylor's report was admissible because Razatos testified as an expert, and "[w]hen scientific evidence is presented as an *independent opinion* formed by a qualified expert witness . . . *that opinion is the evidence* and that expert is the witness for purposes of the Confrontation Clause." Br. of States 13 (emphasis added); *see also id.* 24-27; Br. of NDAA 9-13. This argument does not apply to the facts of this case, and even if it did, it would not change the outcome.

1. The State expressly disclaims any argument that Razatos's testimony provided any "independent opinion" regarding petitioner's blood alcohol content. As the State acknowledges, "[a]side from reading a report that was introduced as an exhibit (JA 55), Mr. Razatos offered *no opinion* about Petitioner's blood alcohol content." Resp. Br. 58 n.15 (emphasis added).[3] Instead, the State introduced Caylor's forensic report as a "business record," and argued without any reference to expert-testimony concepts or any limiting instruction from the trial court that the report alone proved petitioner's unlawful BAC. JA 7, 44-45.

2. Even if the State had proceeded under its local expert testimony rules, it would not have changed the nature of the confrontation violation here

New Mexico Rule of Evidence 11-703 – like Federal Rule of Evidence 703 – provides that a party may introduce facts or data that supply a basis for an expert witness's opinion whenever the facts or data are "of a type reasonably relied upon by experts in

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[3] The relevant portion of Razatos' direct testimony reads as follows:

> Q "And, were the results recorded on this particular document?"
>
> A "Yes, they were."
>
> Q "And, can you tell the jury what the results were of this?"
>
> A "The results were zero point two one grams of alcohol per one hundred milliliters of blood."

JA 54-55.

the particular field in forming opinions or inferences," and the "probative value" of the facts or data "in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." But even accepting the New Mexico Supreme Court's assertion that "the trial court reasonably could have found that the probative value of [Caylor's forensic report] in assisting the jury to evaluate Razatos's testimony" satisfied the requirements of Rule 11-703, JA 17, this reality makes no difference. As this Court has made clear time and again, "[w]here testimonial statements are involved," the Confrontation Clause's application does not turn on "the vagaries of the rules of evidence." *Crawford*, 541 U.S. at 61; *see also id.* at 56-57 n.7 (confrontation concerns "do[] not evaporate" when *ex parte* testimony satisfies a modern rule of evidence, even if that rule is "justifiable in other circumstances"); *Melendez-Diaz*, 129 S. Ct. at 2539-40 (irrelevant whether testimonial statements qualify as "business or official records"); *Davis*, 547 U.S. at 820 (same regarding excited utterances). This principle applies with respect to modern expert witness rules (Fed. R. Evid. 703 was enacted in 1975), the same as it applies to other rules of evidence.[4]

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[4] Because the State introduced Caylor's report into evidence, this case does not present the question whether, or under what circumstances, the Confrontation Clause permits experts to testify based upon others' testimonial statements that the prosecution does not introduce into evidence. Some courts have permitted testifying experts to "present their own independent judgments," even when based in part on reviewing a nontestifying witness's testimonial statements, so long as the

To be sure, the Confrontation Clause "does not apply to statements that are not admitted for the truth of the matter." Br. of NDAA 11 (citing *Crawford*, 541 U.S. at 60 n.9). In *Tennessee v. Street*, 471 U.S. 409 (1985), for example, the defendant argued that his confession was false because the police had read him the written confession of his alleged accomplice and told him to say the same thing. *Id.* at 411. The prosecution countered by introducing the nontestifying accomplice's confession to show that it differed in material ways from the defendant's. Because the accomplice's testimonial statement was introduced for a reason unrelated to whether it accurately recounted information, its introduction did not violate the Confrontation Clause. *Id.* at 413-14.

But contrary to NDAA's wishful thinking, it is simply "nonsense" to claim that a forensic report introduced to provide a basis for an analyst's in-court testimony is not introduced for the truth of the matter asserted. David H. Kaye, et al., *The New Wigmore, A Treatise on Evidence: Expert Evidence* § 4.10.1, at 197 (2d ed. 2011). As the *New Wigmore* treatise, as well as other courts and commentators, have explained:

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prosecution does not introduce those statements and the testifying expert does not repeat them. *See, e.g., United States v. Johnson*, 587 F.3d 625, 635-36 (4th Cir. 2009). But even assuming that this procedure is generally valid, the Confrontation Clause might be violated if an expert testifies in a manner that leads the jury to infer the substance of a nontestifying witness's testimonial statements. *See id.*; *United States v. Mejia*, 545 F.3d 179, 199 (2d Cir. 2008).

> To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.

Id. at 196; *see also People v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005) ("The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context."); Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Geo. L.J. 827, 855-56 (2008) ("[I]t is not logically possible for a jury to use the hearsay statements [in a forensic report] to assess the weight of the expert's opinion other than by considering their truth."). Accordingly, the Confrontation Clause regulates the admission of testimonial "basis evidence" just the same as it regulates other testimonial evidence.[5]

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[5] Because the State introduced Caylor's report instead of any machine-generated printouts, this Court need not decide here whether the prosecution may introduce such printouts as basis evidence to support an expert's in-court testimony. Some judges have held that machine-generated printouts are nontestimonial insofar as they do not contain any human assertions. *See, e.g., United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007). Under this view, the prosecution may

D. Any Burden That The Confrontation Clause Imposes In This Context Does Not Justify Dispensing With Confrontation.

Finally, the amici supporting the State argue that enforcing the Confrontation Clause's time-honored requirements in the context of forensic evidence is too burdensome. This Court already rejected this basic argument in *Melendez-Diaz*. To the extent that the amici advance any new arguments specifically applicable to the Clause's particular-witness rule, those arguments do not justify suspending the rule here.

1. The amici contend that the Confrontation Clause should not apply to forensic reports primarily because laboratories sometimes perform thousands of tests per year. Br. of NDAA 22-25; Br. of States 5-8. But this Court already held in *Melendez-Diaz* that "the substantial total number of controlled-substance analyses performed by state and federal laboratories in recent years" provides no license to suspend the Clause's requirement that the prosecution prove its case through live, as opposed to written, testimony. 129 S. Ct. at 2540. As this Court has explained, "[i]t is a truism that constitutional protections have

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introduce at least portions of such printouts free and clear of confrontation restrictions. Others, however, have concluded that machine-generated printouts are entirely "the hearsay statements of the technicians who ran the tests." *Id.* at 232 (Michael, J., dissenting). Under this view, forensic printouts would be considered testimonial statements of the machine operators and the confrontation principles discussed above would restrict their admission. *See id.* at 234.

costs." *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988). Yet "[t]he Confrontation Clause – like . . . other constitutional provisions – is binding, and we may not disregard it at our convenience." *Melendez-Diaz*, 129 S. Ct. at 2540; *see also Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("[O]ur decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice."); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring states to provide attorney for indigent defendants regardless of burden).

2. In light of this Court's holding in *Melendez-Diaz* that, notwithstanding any burden it imposes, the Confrontation Clause requires the prosecution to introduce forensic reports though live witnesses, the only question here is whether enforcing the *particular-witness rule* in the context of forensic evidence imposes any marginal additional burdens that justify suspending that rule. It does not.

As an initial matter, many jurisdictions across the country – from large cites with high crime rates such as Oakland and Detroit, to sparsely populated states such as Alaska and South Dakota – already apply not only the Confrontation Clause's live-testimony rule but also its particular-witness rule in the context of forensic evidence. *See* Br. of Public Defender Service (PDS) et al. 3, 5-15. Most of these jurisdictions have done so for decades. *Id.* at 7. The PDS brief details how these various jurisdictions minimize and mitigate the burdens on their forensic labs, using both statutory tools (such as notice-and-demand statutes) and practical accommodations. *Id.* at 7-25; *see also Melendez-Diaz*, 129 S. Ct. at 2540-42; Br. of Law Profs. 26-31. Neither the NDAA nor

the States dispute any of the empirical assertions in the PDS brief. That fact alone should cause this Court to brush aside their predictions of doom.[6]

At any rate, neither of the burdens that the amici supporting the State allege justifies suspending the particular-witness rule in the context of forensic evidence.

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[6] Indeed, although Massachusetts in *Melendez-Diaz*, similarly tried to scare this Court with "dire predictions" concerning applying the Confrontation Clause to forensic reports, 129 S. Ct. at 2540, a Massachusetts prosecutor commented after the decision in that case was announced:

> Many of you may expect me to get up here today and say, "The sky is falling, this is horrible, this is horrible, we cannot do justice." Well, I'm here to say quite the opposite. . . . [B]ased upon the efforts that have been made since the *Melendez-Diaz* decision, I can say that I think it's going to work out, and I think especially . . . when it comes to drug cases, I'm quite confident that our state and hopefully all states in the country are going to be able to deal with *Melendez-Diaz* in an efficient, appropriate and just way, to hold those accountable but also to afford the constitutional rights to all defendants.

Reply Br. 27, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191), 2009 WL 4709535, at *27 (quoting Patrick M. Haggan, Chief Trial Counsel, Suffolk Cnty. Dist. Attorney's Office, Remarks at New England School of Law Symposium: Confronting Forensic Evidence: Implications of *Melendez-Diaz v. Massachusetts* and *Briscoe v. Virginia* (Nov. 13, 2009)). This prediction is consistent with statistics in the States' brief. *See* Br. of States 7 (showing that analysts in Los Angeles County spend an average of between 2.23 and 6.52 hours per month attending court).

a. *Multiple witnesses.* The States argue that that "[f]orensic science service systems cannot absorb the demands on their resources that would result if *every forensic analyst who generates data* in connection with a criminal case is required to personally testify in order to satisfy the Confrontation Clause." Br. of States 6 (emphasis added).

This argument misapprehends what the Confrontation Clause requires. As this Court explained in *Melendez-Diaz*, the prosecution must merely present the live testimony of anyone whose testimonial statements it wishes to introduce – not "everyone who laid hands on the evidence." 129 S. Ct. at 2532 n.1. If, for example, ten people witness different stages of a bank robbery, the prosecution is obliged to call only those witnesses whose testimonial statements it wishes to introduce at trial – not all ten people who saw the robbery. By the same token, if multiple people have a connection to forensic evidence, the prosecution must call only those persons whose testimonial statements it chooses to introduce.

To be sure, the Confrontation Clause, coupled with the Due Process Clause's beyond-a-reasonable-doubt rule, will sometimes have the effect of requiring a prosecutor to put multiple forensic witnesses on the stand. But again, this reality is no different from other areas of criminal law. If several people witness different components of a white-collar accounting fraud, and the fraud can be proven only by combining all of the components, then the prosecution must put all of those witnesses on the stand.

In fact, the particular-witness rule actually imposes *less* of a burden in the forensic context than in others. Unlike dealing with eyewitnesses after the fact, the government in the forensic context can decide in advance who it wants to be its witnesses and thereby guard to some degree against future unavailability. The government can also decide how it wishes to structure its forensic laboratories, so as to minimize the number of witnesses necessary to introduce forensic reports. It takes, for example, only one analyst to run a test and write a report with respect to BAC and most other kinds of forensic matters (controlled substances, fingerprints, fibers, ballistics, etc.). Any evidentiary burden beyond that is a state's own making.[7]

b. *Unavailable witnesses.* The NDAA asserts that reversing the New Mexico Supreme Court's decision could hamper the prosecution of "cold cases" when an analyst such as a forensic pathologist has died. Br. of NDAA 26-31. The problem of unavailable witnesses, however, is hardly unique to

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[7] The one possible exception appears to be DNA testing, where multiple analysts sometimes are used. But even there, it appears that one analyst is often enough and that two is usually sufficient. *See, e.g., Hamilton v. State*, 300 S.W.3d 14, 19-20 (Tex. Ct. App. 2009) (noting that a single analyst "screened the physical evidence in [defendant's] case for biological material," "developed a DNA profile," "compare[ed] graphs of each DNA profile," and wrote a "report"); *Contreras v. State*, 939 N.E.2d 708, 2010 WL 5395063, at *3 (Ind. Ct. App. Dec. 22, 2010) (one analyst); *Pendergrass v. State*, 913 N.E.2d 703, 705 (Ind. 2009) (one analyst "performed the original laboratory processing" to generate DNA profiles and another drew statistical conclusions from those profiles), *cert. denied*, 130 S. Ct. 3409 (2010).

forensic testimony. Throughout history, when the passage of time has rendered a crucial eyewitness or investigative police officer unavailable, the confrontation guarantee has barred the prosecution from introducing that witness's testimonial statements unless the defendant has had a prior opportunity to cross-examine that witness. *See Crawford*, 541 U.S. at 59; *accord id.* at 54, 68. That rule applies regardless of the reliability of the statements or their importance to the prosecution.

Indeed, as with multiple witnesses, the burden that the Confrontation Clause's particular-witness rule imposes with respect to unavailable forensic witnesses is actually less than with respect to other unavailable witnesses. At least as a prospective matter, laboratories can take steps to ensure that forensic evidence will be admissible, notwithstanding an analyst's later unavailability. For example, laboratories can videotape testing or take photographs that can serve as bases for other analysts to testify; they can have two analysts perform tests jointly so that either one can later testify; or, as New Mexico law requires and the laboratory here did, they can preserve samples for potential retesting by other analysts. *See* Br. of Law Profs. 31-33; N.M. Admin Code § 7.33.2.15(A)(406); JA 52, 65; Br. of Richard Friedman 24.

In any event, any hypothetical cold-case scenarios in which forensic analysts are unavailable and retesting is impossible are irrelevant here. Even the law professors who advocate creating a narrow exception to the particular-witness rule to deal with such cases recognize that an exception could apply "*only* if (1) the original expert is genuinely

unavailable through no fault of either party; (2) retesting or re-analyzing the materials at issue is not a feasible option; and (3) the original test conditions were documented with sufficient particularity and detail as to permit the surrogate expert to exercise substantial independent judgment in forming an expert opinion." Br. of Law Profs. 6 (emphasis in original). Here, retesting was possible and Caylor was not unavailable; he had merely been "very recently put on unpaid leave" for unspecified reasons. JA 58. If anything, that fact underscores the importance – not the burden – of confrontation, and highlights why petitioner's rights were violated here.

CONCLUSION

For the foregoing reasons, the judgment of the New Mexico Supreme Court should be reversed.[8]

Respectfully submitted,

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[8] If this Court reverses, the State requests (Resp. Br. 59-60) that this Court remand the issue of harmless error, suggesting that petitioner would have received the same "sentence" regardless of whether the lab report had asserted that his BAC was above .16. The State's suggestion is incorrect. Even if petitioner could have received the same sentence with a lower BAC, the lab report here enabled him to be convicted of aggravated DWI instead of simply DWI. *See* N.M. Stat. § 66-8-102(D)(1). Nevertheless, petitioner has no quarrel with the request to leave it to the state courts to determine in the first instance whether the State properly preserved any harmless error argument and, if so, whether the argument is meritorious.

AMICUS CURIAE BRIEF

No. 09-10876

In the Supreme Court of the United States

DONALD BULLCOMING, *Petitioner*,

v.

NEW MEXICO, *Respondent*.

ON WRIT OF CERTIORARI TO THE
NEW MEXICO SUPREME COURT

BRIEF FOR THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, COLORADO, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, WYOMING AS *AMICI CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Summary of Argument 1

Argument 5

I. The crucial importance of reliable forensic science evidence in modern criminal litigation should be considered in interpreting the Confrontation Clause 5

A. The stresses on forensic science services should not be exacerbated 5

B. Extending *Melendez-Diaz* will adversely affect laboratory efficiency and technology 8

C. Extending *Melendez-Diaz* would hinder DNA data bank programs 10

II. A defendant's confrontation right is satisfied by the opportunity to cross-examine a qualified expert presenting an in-court opinion on forensic evidence 12

A. The forensic expert who offers an opinion with evidentiary value is the witness against the defendant 12

TABLE OF CONTENTS
(continued)

Page

B. Federal Rule of Evidence 703 and state equivalents appropriately permit an expert to base an opinion on data generated by another analyst 24

C. Additional evidentiary controls ensure protection of Confrontation Clause rights 28

D. Cross-examination of a qualified expert other than the analyst provides meaningful confrontation 30

Conclusion 37

TABLE OF AUTHORITIES

Page

CASES

Briscoe v. *Virginia*
___ U.S. ___, 130 S. Ct. 1316 (2010) 6
Commonwealth v. *Barbosa*
457 Mass. 773, 933 N.E.2d 93 (2010) 27
Crawford v. *Washington*
541 U.S. 36 (2004) ..... passim
Daubert v. *Merrell Dow Pharmaceuticals*
509 U.S. 579 (1993) 21, 28
Davis v. *Washington*
547 U.S. 813 (2006) 19
Delaware v. *Fensterer*
474 U.S. 15 (1985) 30
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475 U.S. 673 (1986) 30
Ethyl Corp. v. *EPA*
541 F.2d 1 (D.C. Cir. 1976) 21
Frye v. *United States*
293 F. 1013 (D.C. Cir. 1923) 29
Gray v. *Maryland*
523 U.S. 185 (1998) 16
Mannino v. *Int'l Mfg. Co.*
650 F.2d 846 (6th Cir. 1981) 25
McDaniel v. *Brown*
___ U.S. ___, 130 S. Ct. 665 (2010) 22
Melendez-Diaz v. *Massachusetts*
557 U.S. ___, 129 S. Ct. 2527 (2009)..... passim
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TABLE OF AUTHORITIES
(continued)

Page

People v. *Brown*
13 N.Y.3d 332, 918 N.E.2d 927 (2009) 20
People v. *Dungo*
102 Cal. Rptr. 3d 282, 220 P.3d 240 (2009)..... 5
People v. *Gutierrez*
102 Cal. Rptr. 3d 281, 220 P.3d 239 (2009)..... 5
People v. *Kelly*
17 Cal. 3d 24, 549 P.2d 1240 (1976) 29
People v. *Lopez*
102 Cal. Rptr. 3d 283, 220 P.3d 240 (2009)..... 5
People v. *Rutterschmidt*
102 Cal. Rptr. 3d 281, 220 P.3d 239 (2009)..... 5
Richardson v. *Marsh*
481 U.S. 200 (1987) 16
Roberts v. *United States*
916 A.2d 922 (D.C. Ct. App. 2007)..... 16, 17
Schad v. *Ryan*
595 F.3d 907 (9th Cir. 2010) 17
State v. *Appleby*
289 Kan. 1017, 221 P.3d 525 (2009) 20
State v. *Aragon*
147 N.M. 474, 225 P.3d 1280 (2010)..... 14, 23, 24
State v. *Coombs*
149 N.H. 319, 821 A.2d 1030 (2003)..... 7
State v. *Crager*
124 Ohio St. 3d 1446, 920 N.E.2d 375
(2010) 10
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160 N.H. 135, 999 A.2d 1092 (2010)..... 26

TABLE OF AUTHORITIES
(continued)

Page

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No. 09-0339, 2010 WL 5173627 (Ariz. Dec. 22, 2010) 26
United States v. *Darden*
656 F. Supp. 2d 560 (D. Md. 2009) 20
United States v. *Johnson*
587 F.3d 625 (4th Cir. 2009) ..... passim
United States v. *Lamons*
532 F.3d 1251 (11th Cir. 2008) 18
United States v. *Law*
528 F.3d 888 (D.C. Cir. 2008) 27
United States v. *Lombardozzi*
491 F.3d 61 (2nd Cir. 2007) 27
United States v. *Moon*
512 F.3d 359 (7th Cir. 2008) 14, 20, 27
United States v. *Morrow*
374 F. Supp. 2d 51 (D.D.C. 2005) 22
United States v. *Pablo*
625 F.3d 1285 (10th Cir. 2010) 27, 35
United States v. *Sczubelek*
402 F.3d 175 (3d Cir. 2005) 11
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591 F.3d 928 (7th Cir. 2010) 27
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498 F.3d 225 (4th Cir. 2007) 14, 17, 18, 19
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447 F.2d 1285 (5th Cir. 1971) 26
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(continued)

Page

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84 Ill. 2d 186, 417 N.E.2d 1322 (1981) 25

STATUTES

18 U.S.C. § 3297 11
Cal. Evid. Code § 801 25

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U.S. Const. amend. VI ..... passim

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Fed. R. Evid. 104(a) 27
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(continued)

Page

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Page

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TABLE OF AUTHORITIES
(continued)

Page

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INTEREST OF AMICI CURIAE

Petitioner seeks an extension of *Melendez-Diaz* v. *Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527 (2009), that would severely impair Amici States' ability to introduce independent and reliable scientific testimony from qualified experts in criminal trials. His desired expansion of *Melendez-Diaz* would inhibit the development of efficient laboratory procedures that involve more than a single centralized analyst. And it would impair the search for truth in state criminal prosecutions dependent on high-volume forensic science disciplines as well as in many other cases—typically homicides and sexual assaults—solved with DNA database matches years or even decades after the original testing of forensic evidence.

Amici States also have a strong interest in maintaining their existing rules of evidence. Those rules generally permit expert witnesses—who appropriately draw upon information from non-testifying scientists, technicians, and programmers—to render reliable opinions concerning physical evidence. Petitioner's proposed extension of *Melendez-Diaz* would suddenly treat these well-established rules as out of compliance with the Confrontation Clause.

SUMMARY OF ARGUMENT

The New Mexico Supreme Court correctly held that trial testimony by a competent expert rendering an independent opinion on forensic evidence satisfies the Confrontation Clause.

1. The application of scientific techniques to physical evidence is a crucial part of the criminal justice system. Following *Melendez-Diaz* v. *Massachusetts*, many criminal courts correctly continue to allow into evidence a qualified scientific expert's independent opinion, subject to cross-examination, based in part upon data or observations generated from forensic testing by a non-testifying examiner or analyst. Petitioner's proposed extension of *Melendez-Diaz*, which would require production of every analyst at trial, would constrict, if not end, this reliable practice.

Requiring testimony from every analyst who performed some part of a scientific test or procedure, and who may have no specific recollection of any particular test, would advance no interest protected by the Confrontation Clause. Instead it would do harm. It would pull valuable analysts away from their underresourced laboratories and into courthouses. And it would stifle continued development and improvement of reliable and efficient evidence-processing protocols that rely on multiple technicians or analysts in a given case.

Such a regime, also, would introduce perverse incentives for the accused to gamble on an analyst's nonappearance at trial by resisting an early plea bargain. Similarly, it often would force the prosecutor to mitigate the risk of such nonappearance by offering a more lenient sentence disposition than the merits of the case would justify. The risk would be most acute in cases involving forensic science disciplines where high volumes of physical evidence are tested, and disciplines in which evidence cannot easily or inexpensively be retested.

Indeed, an overly rigid extension of *Melendez-Diaz* would result in a de facto statute of limitations for crimes where an unavailable examiner or analyst played any role in developing crucial scientific proof. This burden on the justice system would be offset by little or no improvement in the truth-finding function of the criminal trial. And, with their forensic services already overtaxed, the impact on Amici States would be further exacerbated.

2. In-court testimony from a qualified expert who renders an independent opinion about forensic evidence satisfies the Confrontation Clause. The defense, in turn, may cross-examine the expert about her opinion and her reasons for it.

Nothing in *Melendez-Diaz* conflicts with this practice. The Court in that case merely disapproved use of a formalized testimonial statement about physical evidence, offered at trial in the absence of the person who rendered that scientific conclusion. Nor does *Melendez-Diaz* justify petitioner's emphasis on identifying and producing at trial all analysts who processed physical evidence. Whether or not the in-court expert personally facilitated the production of data, the in-court opinion itself is the evidence against the accused, and the defendant retains his constitutional right to confront that expert. The expert is not a "surrogate," as petitioner asserts. Rather, the expert is the witness against the accused whose testimony satisfies the Confrontation Clause. Thus, here, petitioner was confronted with the expert witness against him.

Conversely, the testing data produced from the scientific instruments in this case were not testimonial statements of witnesses subject to the

confrontation right. Raw testing data, laboratory observations, scientific theories, and forensic examination methods commonly undergird an expert witness's opinion. But all these are only premises of the experts' testimony. Although they represent the contributions of scientists, programmers, analysts, or technicians other than the testifying expert, they rarely have standalone evidentiary significance in court. To isolate and label "testimonial" any statement made by a person in the network of scientific data and principles underlying an opinion would be unworkable. It would open the door to defense demands to cross-examine not only the expert providing evidence, but also a multitude of participants deeper in the scientific process.

State evidence rules, similar to Federal Rules of Evidence 702 and 703, take proper account of the realities of forensic testing and scientific testimony, and of concerns of fairness, by providing trial courts with discretion to control the content and form of expert testimony. They permit scientific experts to testify to their independent opinions based upon multiple sources of necessary data and information. But they impose on the trial judge the duty to ensure that the underlying bases of the expert's opinion testimony are reliable. In ruling on the admissibility of the expert opinion, the judge considers whether the bases of the opinion have been independently evaluated in view of laboratory protocols, methods, and quality controls. The judge's scrutiny thus provides constitutionally adequate protection against an in-court expert acting as a mere reader of, or conduit for, another analyst's conclusion.

ARGUMENT

I. THE CRUCIAL IMPORTANCE OF RELIABLE FORENSIC SCIENCE EVIDENCE IN MODERN CRIMINAL LITIGATION SHOULD BE CONSIDERED IN INTERPRETING THE CONFRONTATION CLAUSE

Many courts have struggled with the question of whether and how *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, applies to an expert witness's in-court, independent, testimonial opinion where it is based in part upon forensic science test data recorded by an analyst who does not testify.[1] This unresolved scenario was not presented in *Melendez-Diaz*, but lies at the core of the present case, J.A. 13-14, and is a routine occurrence in criminal cases nationwide. The Court's prediction in *Melendez-Diaz* that "the sky will not fall" in the wake of its decision, 129 S. Ct. at 2540, thus was premature at best.

A. The Stresses on Forensic Science Services Should Not Be Exacerbated

1. Concerns about *Melendez-Diaz*'s impact upon the criminal justice system have been consistently reported and remain unabated. A

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[1] For instance, in several pending appeals, the California Supreme Court will address the admissibility of expert witness testimony based in part upon the observations and results recorded by a non-testifying analyst or pathologist. *People* v. *Dungo*, 102 Cal Rptr. 3d 282, 220 P 3d 240 (2009); *People* v. *Lopez*, 102 Cal. Rptr. 3d 283, 220 P.3d 240 (2009); *People* v. *Rutterschmidt*, 102 Cal. Rptr. 3d 281, 220 P.3d 239 (2009); *People* v. *Gutierrez*, 102 Cal. Rptr. 3d 281, 220 P.3d 239 (2009).

national report cited in *Melendez-Diaz* noted that "a number of factors have combined in the past few decades to place increasing demands on an already overtaxed, inconsistent, and underresourced forensic science infrastructure." Comm. on Identifying the Needs of the Forensic Sci. Cmty., Nat'l. Research Council of the Nat'l. Academies, *Strengthening Forensic Science in the United States: A Path Forward* 39 (2009) [*2009 NAS Report*], *available at* http://www.nap.edu/catalog.php?record_id=12589. This corroborates information, received previously by the Court from a number of sources, documenting adverse results from imposing additional burdens upon forensic science service providers. E.g., Brief for Indiana et al. as Amici Curiae, at 5-11, *Briscoe* v. *Virginia*, ___ U.S. ___, 130 S. Ct. 1316 (2010) (No. 07-11191); Brief for Alabama et al. as Amici Curiae, at 25-28, *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591). These warnings continue to resonate.

Forensic science service systems cannot absorb the demands on their resources that would result if every forensic analyst who generates data in connection with a criminal case is required to personally testify in order to satisfy the Confrontation Clause. For example, a typical blood-and-breath alcohol analyst in California completed 3,220 requests for analysis in 2007; and controlled-substances analysts each completed an average of 1,053 requests.[2] Calif. Crime Lab'y Rev. Task Force,

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[2] The volume of work in these forensic science disciplines strongly suggests that when an analyst does testify, she will routinely do so without actual recollection of one test

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An Examination of Forensic Science in California 64 (2009), *available at* http://ag.ca.gov/publications/crime_labs_report.pdf. Even this volume of forensic casework has failed to keep up with demand, however, leading to statewide backlogs in these and other forensic science disciplines. *Id.* at 63, 64.

In addition to processing evidence, forensic analysts must attend to laboratory administrative duties, training, and quality assurance activities, as well as spend time traveling to court, waiting in court, and testifying. In a recent twelve-month period, the ten toxicologists working for the Los Angeles Police Department's (LAPD) Scientific Investigation Division collectively spent more than 782 hours attending 261 court appearances. E-mails from Gregory Matheson, Lab. Director, Los Angeles Police Dept. Criminalistics Lab., to Michael Chamberlain, Counsel of Record for the Amici States (Nov. 2, 2010, 14:46 PST; Nov. 8, 2010, 11:37 PST) (on file with author). The sixteen LAPD narcotics analysts spent 428 hours making 140 court appearances during the same period. *Id.*

2. The still-life observation that only a fraction of cases proceed to trial, see *Melendez-Diaz*, 129 S. Ct. at 2540, thus fails to capture the real-world dynamic of forensic science services. Were this Court to adopt petitioner's argument, case-disposition offers to defendants in prosecutions requiring alcohol, controlled substance, toxicology, DNA, or other forensic science evidence would be

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out of hundreds or even thousands. See, *e.g.*, *State* v *Coombs*, 149 N.H. 319, 323, 821 A 2d 1030, 1033 (2003).

distorted by the real risk that an analyst, attenuated from the in-court expert's testimony, might become unavailable at trial for any one of many possible reasons. The analyst might take ill, use parental leave, experience conflicting court obligations, retire, or worse. Defendants, calculating the odds, would be presented with a new disincentive to enter into early plea bargains. That disincentive would be acute in cases involving older investigations and in cases where physical evidence is not easily or inexpensively reanalyzed. The palpable consequences of petitioner's argument, then, extend beyond necessitating more trials. They also would include unduly lenient plea bargains for defendants in a position to exploit the chance that an analyst will become unavailable.

B. Extending *Melendez-Diaz* Will Adversely Affect Laboratory Efficiency and Technology

1. Extending *Melendez-Diaz*, to categorically ban expert scientific opinion testimony where raw data is generated by non-testifying analysts, would bring about other ill effects. It would strongly discourage, if not end, a growing practice in forensic laboratories of engaging in high-volume processing of evidence samples by teams of analysts instead of just one.

For example, the Office of the Chief Medical Examiner for New York City conducts DNA testing in more than 3,000 cases each year, and "rotates" its forensic biology staff through weekly assignments that focus on an isolated analytical task carried out in many different cases. M. Samples et al., *The Rotating Analyst – The NYME Casework System*, 8

Progress in Forensic Genetics 619, 619 (2000). Multiple analysts are thus responsible for the data generated in a given case. *Id.* at 620. This method "allows high throughput without sacrificing quality," and permits flexible and predictable staffing schedules. *Id.* Courtroom testimony is provided by an interpreting analyst who "is confident of the training of the entire staff and can rely on an extensive review process of each DNA report . . . ." *Id.*

The unworkable alternative—threatened by petitioner's reading of the Sixth Amendment—is illustrated by a recent robbery prosecution in Orange County, California. There, concern about confrontation claims motivated the prosecutor to call all twelve forensic analysts who had participated in the batch processing of DNA samples. *People* v. *Acosta* (Orange Cty. No. 07CF1858); E-mail from Mary Hong, Senior Forensic Scientist/DNA Supervisor, Orange County Crime Laboratory, to Michael Chamberlain, Counsel of Record for the Amici States (Nov. 5, 2010, 11:04 PST) (on file with author). The witnesses comprised half of the DNA analysts employed by the laboratory. *Id.* Each analyst-witness spent more time traveling to and from court, speaking with the prosecutor, and waiting in the courthouse hallway than he or she did testifying. *Id.* One analyst spent more than twelve hours away from the laboratory for approximately thirty minutes of testimony. *Id.*

2. Adopting petitioner's position would also reduce incentives to develop new and better forensic science technologies. The state laboratory in Ohio, for instance, recently began using robotics in its

batch-processing of DNA samples: "Assisted by robots, one analyst performs the first stages of testing on a large batch of samples encompassing many cases—extracting the DNA, determining the amount of human DNA present, and amplifying and processing it through a genetic analyzer. Then, other analysts interpret the profiles, make comparisons and conclusions and write reports for the individual cases." Supplemental Brief for Ohio Att'y Gen'l as Amicus Curiae, at 18, *State* v. *Crager*, 124 Ohio St. 3d 1446, 920 N.E.2d 375 (2010) (Nos. 2006-0294 & 2006-0298). An unnecessarily rigid interpretation of the Confrontation Clause, however, would chill technological developments that would permit decentralized processing of forensic science casework. The law should encourage technological innovation, not inhibit it.

C. Extending *Melendez-Diaz* Would Hinder DNA Data Bank Programs

Finally, expansion of *Melendez-Diaz* would threaten the efficacy of DNA database programs. Such programs have proven highly successful in solving serious cases that had gone "cold" for years, if not decades. See generally David Kaye, *Rounding Up the Usual Suspects: A Legal and Logical Analysis of DNA Trawling Cases*, 87 N.C. L. Rev. 425, 427 (2009) (describing DNA database matches that solved two-and three-decade-old rapes and murders); Federal Bureau of Investigation, CODIS-NDIS Statistics, http://www.fbi.gov/about-us/lab/codis/ndis-statistics (last visited Jan. 10, 2011) ("As of November 2010, CODIS has produced over 130,900 hits assisting in more than 127,600 investigations.").

All fifty States and the Federal Government maintain DNA database programs designed to provide investigative leads in unsolved cases—primarily crimes of violence and sexual assaults—where there exists DNA evidence attributable to the perpetrator. *United States* v. *Sczubelek*, 402 F.3d 175, 181, 185 n.5 (3d Cir. 2005). The welcome prospect of bringing perpetrators of serious crimes to justice following DNA database matches has inspired legislators to modify statutes of limitations to permit prosecution many years after the fact where DNA evidence is available. E.g., 18 U.S.C. § 3297 (2010).

Along with the possibility of prosecuting "cold" crimes, however, comes a higher probability that analysts, examiners, and pathologists who originally worked on the old cases will have retired, died, or otherwise become unavailable. For example, Dr. Boyd Stephens died in April 2005 after serving as the Chief Medical Examiner for the City and County of San Francisco since 1971. Obituary, *Dr. Boyd Stephens*, S.F. Chron., April 5, 2005, at B5. Dr. Pierce A. Rooney, Jr. died in January 2009 after serving as a pathologist for the Sacramento County Coroner's Office since 1969. Obituary, *Dr. Pierce A. Rooney, Jr.*, Sac. Bee, Jan. 25, 2009, at B5. It is not unlikely that among the thousands of autopsies these and other now-deceased medical examiners performed are homicide cases that yet will be solved using DNA database technology. But the death of the pathologist should not sound the death knell for the prosecution of the case, as well. See generally Carolyn Zabrycki, *Comment: Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Cal. L.

Rev. 1093, 1115-17 (2008) [Zabrycki, *Autopsy Reports*].

The Confrontation Clause does not require the near monopolization of laboratory and courthouse resources that petitioner's argument implies. Still less does the Clause envision that the ongoing availability or life spans of scientists, medical examiners, and laboratory analysts should work as a de facto statute of limitations in forensic science criminal cases. That cannot serve as the norm in any rational system of criminal justice.

II. A Defendant's Confrontation Right Is Satisfied by the Opportunity to Cross-Examine A Qualified Expert Presenting An In-Court Opinion On Forensic Evidence

When forensic science evidence is provided to a finder of fact in the form of an expert opinion, the person who renders that opinion is not a "surrogate." She is the constitutionally significant witness against the defendant. Her testimony, subject to cross-examination at trial, satisfies the Confrontation Clause. The fact that the expert rendering an independent opinion might rely on hearsay, testimonial or not, gives rise to no Confrontation Clause violation.

A. The Forensic Expert Who Offers An Opinion With Evidentiary Value Is the Witness Against the Defendant

1. A scientific expert giving her independent opinion is the witness whose presence on the stand satisfies the Confrontation Clause. The defense may

fully cross-examine her on her opinion and her reasons for it.

Melendez-Diaz is not to the contrary. The Court in that case, instead, held that where an expert opinion is set forth in a formalized document offered as evidence in place of live testimony, it is a testimonial statement subject to the restrictions of the Confrontation Clause as interpreted in *Crawford* v. *Washington*, 541 U.S. 36 (2004). *Melendez-Diaz*, 129 S. Ct. at 2531, 2532. Similarly, *Crawford* and its progeny imply that an expert opinion recorded in an unsworn laboratory report may not simply be read into evidence at trial by a custodian of records, or another expert who acts as a conduit for the original analyst's hearsay opinion. E.g., *United States* v. *Johnson*, 587 F.3d 625, 635 (4th Cir. 2009).

When scientific evidence is presented as an independent opinion formed by a qualified expert witness, however, that opinion is the evidence and that expert is the witness for purposes of the Confrontation Clause. This holds true even when the witness bases her opinion on data or observations recorded by other analysts.

2. The only "testimonial" portions of a laboratory report are those that operate as the functional equivalent of in-court testimony. See *Crawford*, 541 U.S. at 51-52. Testimonial statements in a report offer a conclusion for evidentiary purposes—as distinguished from the scientific theory and raw data or empirical observations underlying that conclusion. For example, the New Mexico Supreme Court recognized that the report at issue in *Bullcoming*'s companion case of *State* v. *Aragon*, 147 N.M. 474, 225 P.3d 1280 (2010), went "directly to an

issue of guilt in that it identifies the white, crystal-like substance located near Defendant's hiding place as methamphetamine, a necessary element of the crime . . . for which Defendant was charged. As such, [the] report serves to bear testimony against Defendant, and is the functional equivalent of live, in-court testimony that would otherwise be offered directly by [the analyst] herself." 225 P.3d at 1288.

Empirical data or observations underlying a conclusion, however, are distinctly non-testimonial, whether or not transcribed into a report. See *Aragon*, 225 P.3d at 1290 (distinguishing an expert's judgments "whether a substance is narcotic and its degree of purity" from "the computerized analytical results" and "reference data" that are assessed to reach that conclusion); *United States* v. *Washington*, 498 F.3d 225, 229-30, 232 (4th Cir. 2007) (distinguishing computer-generated chromatography graphs and raw data from an expert's evidentiary conclusion that the blood sample contained a drug and alcohol); see also *United States* v. *Moon*, 512 F.3d 359, 361 (7th Cir. 2008) ("The report has two kinds of information: the readings taken from the instruments, and Olson's conclusion that these readings mean that the tested substance was cocaine. The latter is testimonial as the Supreme Court used that word in *Crawford*.").

The fundamental difference between scientific data and a scientific conclusion is that the former are merely a premise of the latter, and usually lack evidentiary significance when considered in isolation outside the context of an applied scientific theory, a methodology, and an explanatory expert opinion. "[T]he expert's testimony is a syllogism: the major premise is the validity of the general theory or

technique, the minor premise is the case specific data, and the application of major to minor yields a conclusion relevant to the merits of the case." Kenneth S. Broun, 1 *McCormick on Evidence* 72 (6th ed. 2006); see also Edward J. Imwinkelried, *The "Bases" Of Expert Testimony: A Syllogistic Structure Of Scientific Testimony*, 67 N.C. L. Rev. 1, 2-3 (1988) [Imwinkelried, *"Bases" of Expert Testimony*].

Professors Imwinkelried and Faigman offer the following example of "the typical syllogistic structure of expert testimony" about forensic science:

> 1. I am a molecular biologist.
>
> 2. If the DNA fragments on two autoradiographs are in the same position and within acceptable limits of the same length, then the two samples that have been fragmented contain the same DNA markers.
>
> 3. The DNA fragments on these two autoradiographs are in the same position and within acceptable limits of the same length.
>
> 4. Therefore, the samples that were fragmented contain the same DNA markers.

Edward J. Imwinkelried & David L. Faigman, *Evidence Code Section 802: The Neglected Key to Rationalizing the California Law of Expert Testimony*, 42 Loy. L.A. L. Rev. 427, 434 (2009) [Imwinkelried & Faigman, *Evidence Code 802*]. The empirical data and scientific principles involved are premises, *id.* at 435, and neither has standalone evidentiary value. Instead, it is their synthesis in the form of an independent expert opinion that gives

them meaning, whether that opinion is expressed in a written report or rendered by an expert on the witness stand. Imwinkelried, *"Bases" of Expert Testimony*, 67 N.C. L. Rev. at 3 ("The result of applying the major to the minor premise is a conclusion, the witness' opinion on the merits of the case.").

Most often, the data or observations that comprise a premise of an opinion will be meaningless to a layperson without the expert's explanatory conclusion. They thus should not be considered "testimonial." By analogy, an out-of-court statement that is not "incriminating on its face," but becomes incriminating "only when linked with evidence introduced later at trial," is likewise not subject to Sixth Amendment confrontation requirements. *Richardson* v. *Marsh*, 481 U.S. 200, 208 (1987); *Gray* v. *Maryland*, 523 U.S. 185, 191, 196 (1998).

As a practical example of the relationship between data and opinion, consider the raw data from DNA analysis known as an electropherogram. It is a "graph that displays a series of different-colored peaks of different heights." *Roberts* v. *United States*, 916 A.2d 922, 927 (D.C. Ct. App. 2007). By itself, an electropherogram would have little or no meaning to a layperson, let alone evidentiary value to a trier of fact. An expert is required to interpret and explain: "A DNA analyst . . . interprets the data displayed on the electropherogram to determine the DNA profile . . . . Once the DNA profiles from the evidence and known samples are determined, the DNA profile from the evidence is compared to the DNA profiles from known individuals to see if any of those individuals can be excluded as possible

contributors to the evidence (or 'questioned') DNA." *Id.*

Similarly, blood-alcohol analysis using gas chromatography—as in the present case—results in a graph representing chemical components and their concentrations in a manner unlikely to be comprehensible to a layperson. See, *e.g.*, Edward F. Fitzgerald, *Intoxication Test Evidence* § 24:13 (2nd ed. 2010) (displaying various ethanol test chromatograms); *United States* v. *Washington*, 498 F.3d at 228 (noting that blood alcohol raw data consisted of "mechanical computer printouts with each page headed by the date of the test, the machine operator, an identification of the sample, its dilution factor, and other similar information, and containing computer-generated graphs and data reporting the results produced by the chromatograph machine").

A final example is a pathologist's observation in an autopsy report that a subject's hyoid bone was broken. This fact would have little meaning absent an expert's explanation that such a finding is indicative of forceful strangulation. See, *e.g.*, *Schad* v. *Ryan*, 595 F.3d 907, 911 (9th Cir. 2010).

In sum, raw data is not "testimonial" under *Crawford*. They are neither produced as standalone evidence nor used as a substitute for live testimony. Rather, raw data such as ethanol-test chromatograms or DNA electropherograms are premises for a conclusion. The conclusion invariably draws upon still other premises to become "evidence." When the expert articulates her conclusion in court, she gives evidence against the accused. She then is subject to cross-examination on her evidence. She is the witness against the accused, so allowing the

defendant to confront and cross-examine her satisfies the Confrontation Clause.

3. There is another reason instrument data generated by an analyst, even if later relied upon for a conclusion by an in-court expert witness, does not amount to "testimony." While the Sixth Amendment gives a defendant the right "to be confronted with the witnesses against him," U.S. Const., amend. VI, instrument-generated data are not witnesses. An instrument is not a person and cannot bear testimony. *United States* v. *Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008); see also 1 Edward J. Imwinkelried et al., *Courtroom Criminal Evidence* § 1005, at 405-06 (4th ed. 2007). Also, as an inanimate object, an instrument is disinterested in the reasons for or implications of its own output, e.g., whether a substance is sugar or cocaine. Cf. *Melendez-Diaz*, 129 S. Ct. at 2532 (drug certificates testimonial in part because the analysts' "sole purpose" in preparing them was for their use in court as evidence against the accused). Finally, instrument-generated data cannot plausibly be considered statements attributed to the instruments' human operators.

A Fourth Circuit decision, *United States* v. *Washington*, 498 F.3d 225, illustrates these points. Following the defendant's arrest, gas chromatography testing of his blood sample generated some 20 pages of data and graphs. *Id.* at 228. Based on the raw data, the laboratory's chief toxicologist issued a report and subsequently testified that the defendant had specified quantities of both alcohol and phencyclidine (PCP) in his blood. *Id.* The chief toxicologist had not participated in the physical testing: "three lab technicians operating

under his protocols and supervision conducted the tests and then presented the raw data from the tests to him." *Id.* The defendant argued that the chief toxicologist's testimony denied him confrontation because "the machine-generated data amounted to testimonial hearsay statements of the machine operators . . . ." *Id.* at 227.

Rejecting this contention, the court of appeals held that the non-testifying instrument technicians did not make or record testimonial statements because "[t]he raw data generated by the diagnostic machines are the 'statements' of the machines themselves, not their operators." *Washington*, 498 F.3d at 230. Neither were the machine "statements" testimonial. Relying on *Davis* v. *Washington*, 547 U.S. 813 (2006), the court of appeals observed that the data "did not involve the relation of a past fact of history as would be done by a witness." 498 F.3d at 232. Instead, the instrument recorded "the current condition of the blood in the machines."[3] *Id.*; see also *United States* v. *Darden*, 656 F. Supp. 2d 560, 563 (D. Md. 2009) (printed data from blood-testing instrument are not testimonial, and the laboratory supervisor's in-court interpretation of those data satisfied the Confrontation Clause).

The Seventh Circuit has reached a similar conclusion. As it explained,

> A physician may order a blood test for a patient and infer from the levels of sugar

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[3] "Science is merely a tool that paints a picture of what, for want of a better term, we call the 'real world.'" David L. Faigman, *Truth, with a Small "t,"* 49 Hastings L.J. 1185, 1185 (1998).

> and insulin that the patient has diabetes. The physician's diagnosis is testimonial, but the lab's raw results are not, because data are not "statements" in any useful sense. Nor is a machine a "witness against" anyone. If the readings are "statements" by a "witness against" the defendants, then the machine must be the declarant. Yet how could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests. That is one reason why Rule 703 provides that the expert's source materials need not be introduced or even admissible in evidence. The vital questions—was the lab work done properly? what do the readings mean?—can be put to the expert on the stand.

United States v. *Moon*, 512 F.3d at 362; accord, *State* v. *Appleby*, 289 Kan. 1017, 1057-58, 221 P.3d 525, 551-52 (2009) (population databases and computer software used to generate DNA profile rarity statistics do not produce testimonial statements); *People* v. *Brown*, 13 N.Y.3d 332, 340, 918 N.E.2d 927, 931 (2009) (DNA testing raw data not testimonial).

4. The constitutional significance bestowed upon "the analysts" in *Melendez-Diaz* dissipates in cases where an expert provides independent opinion testimony from the witness stand and does not act as a surrogate to transmit another's testimonial conclusions. It is of no constitutional consequence that a testifying expert witness did not personally generate data that becomes one among other premises for her opinion.

Such data is like the academic body of scientific knowledge upon which expert witnesses also rely for their opinion evidence. Scientific evidence is the product of collective and cumulative knowledge from an amalgam of different sources. *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 37-38 (D.C. Cir. 1976).[4] "[A]n expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592 (1993). This is so because the truth of conclusions expressed by any expert, even the analyst who performed testing in a case, depends upon the validity of statements from a regressing line of predicate experts, technicians, programmers, and theorists who contributed to the scientific theory and methodology employed. 2 J. Wigmore, *Evidence* § 665a, at 917, § 665b, at 919 (J. Chadbourn rev. ed. 1979). The factfinder at trial almost never hears live testimony from all these sources of relevant scientific authority that often if not necessarily provide support for expert opinion evidence.

For example, in a typical DNA case where the analyst performs testing and declares a match between DNA profiles, she will offer a statistical expression of the rarity of the shared profile in order to give evidentiary meaning to the match. E.g., *McDaniel* v. *Brown*, ___ U.S. ___, 130 S. Ct. 665, 668 (2010). The rarity statistic is critical to the

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[4] "Scientific evidence is accretionary," wrote E.O. Wilson, "built from blocks of evidence joined artfully by the blueprints and mortar of theory." Edward O. Wilson, *Consilience, The Unity of Knowledge* 59 (1998).

factfinder's assessment of whether the profile is so infrequent that the DNA match becomes compelling identification evidence. *United States* v. *Morrow*, 374 F. Supp. 2d 51, 63 (D.D.C. 2005). But, in providing a rarity statistic, the analyst must rely on many out-of-court statements of other persons: researchers who compile and report population databases used to determine allele frequencies; mathematicians and geneticists who construct the formulae used to convert allele frequencies into profile frequencies; and computer programmers who write the software used by analysts to apply published data and formulae to instrument output in a laboratory. See John M. Butler, *Fundamentals of Forensic DNA Typing* 229-49 (2009).

Similarly, where—as here—an expert bases an opinion in part on instrument-generated data, the opinion implicitly depends upon factors determining the functionality of the instrument itself. Many of those factors—such as programming and calibration of the machines—are uninfluenced by the instrument operator. The strength of inculpatory forensic evidence often depends, therefore, on factors and people much deeper in the scientific process than the analyst. Making the analyst the constitutionally significant reference point is unrealistic where the courtroom witness offering independent opinion evidence against the defendant is a different person.[5]

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[5] Nor is it always a simple matter to identify "the analyst." In a DNA case, for example, one person may examine physical evidence for the presence of cellular material, after which one or more separate analysts will process the evidence to develop a DNA profile. See, *e.g.*, FBI Laboratory Services: DNA-Nuclear, http://www.fbi.gov/about-us/lab/dna-nuclear.

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5. The New Mexico Supreme Court properly recognized these realities when it held that "the live, in-court testimony of a separate qualified analyst is sufficient to fulfill a defendant's right to confrontation." J.A. 14. The original technician "was a mere scrivener" of data from an instrument; the witness against the defendant for Sixth Amendment purposes was the testifying expert. As the basis for his opinion about petitioner's blood-alcohol content, the testifying expert discussed standard procedures used at the lab to record blood-alcohol levels, the testing methods, and the petitioner's blood-alcohol level at the time of the test. J.A. 13, 14. Most important, the testifying expert was subject to cross-examination on all those topics at trial. J.A. 14.

In *State* v. *Aragon*, 225 P.3d 1280, the New Mexico Supreme Court further explained that, while the Confrontation Clause will not tolerate an expert witness who simply restates another analyst's "conclusory opinion," an expert witness may conduct "his own analysis of the underlying facts and data contributing to [the original analyst's] opinion to arrive at his own, independent conclusion." *Id.* at 1290. *Aragon*'s holding, as in *Bullcoming*, implicitly

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Most laboratory reports also undergo a technical review process before issuance, raising the question of whether the technical reviewer is "an analyst." See, *e.g.*, DNA Advisory Board Quality Assurance Standards for Forensic DNA Testing Laboratories, http://www.cstl.nist.gov/div831/strbase/dabqas.htm (last visited Dec. 8, 2010) ("The laboratory shall conduct administrative and technical reviews of all case files and reports to ensure conclusions and supporting data are reasonable and within the constraints of scientific knowledge.").

affirmed the constitutionality of the New Mexico rule of evidence that permits testifying experts to "rely upon or otherwise base their opinions on 'facts or data'" generated by "non-testifying experts." *Id.* at 1288; J.A. 16-17; see N.M. R. Evid. 11-703.

The New Mexico court's reasoning is sound. Under this Court's *Crawford* jurisprudence, laboratory data are significantly different from the expert's evidentiary conclusion drawn from her evaluation and interpretation of the data. While an expert witness necessarily relies on a variety of information, sources, and statements in forming an opinion, "[a]s long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem. The expert's opinion will be an original product that can be tested through cross-examination." *United States* v. *Johnson*, 587 F.3d at 635.

B. Federal Rule of Evidence 703 and State Equivalents Appropriately Permit An Expert To Base an Opinion on Data Generated By Another Analyst

Long before *Crawford*, courts and legislatures struck a considered and thoughtful balance in this area. They allowed experts to provide relevant, reliable opinion testimony based on scientific data and theories generated by others. But they interposed the trial judge as a gatekeeper to preclude those opinions from becoming mere vehicles for transmitting inadmissible hearsay to the factfinder. Those rules pass constitutional muster.

In federal courts, Rule 703 of the Federal Rules of Evidence allows an expert witness to base an opinion on facts or data "perceived by or made known to the expert at or before the hearing," even if those facts or data are not themselves admissible into evidence. The facts or data must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Accordingly, experts in federal court may give opinions using information they normally rely upon, even if that information is not admissible independently. *Mannino* v. *Int'l Mfg. Co.*, 650 F.2d 846, 852 (6th Cir. 1981); *Mendes-Silva* v. *United States*, 980 F.2d 1482, 1485 (D.C. Cir. 1993). The intent of the rulemakers was to "bring the judicial practice in line with the practice of the experts themselves when not in court." Fed. R. Evid. 703 advisory committee's notes.

Forty-two States and two Territories have adopted rules of evidence patterned after the federal rules. Jack B. Weinstein & Margaret A. Berger, 6 *Weinstein's Federal Evidence*, T-128 to T-135 (2d ed. 2010). Other states independently have developed evidentiary principles that operate to similar effect. E.g., Cal. Evid. Code § 801(b);[6] *Wilson* v. *Clark*, 84 Ill. 2d 186, 194-95, 417 N.E.2d 1322, 1327 (1981).

Under such rules, trial courts maintain control over the content of information received by the jury. The court may preclude testimony about the facts and data underlying the expert's opinion, or permit it

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[6] California Evidence Code section 801 was the model for the federal rule. Fed. R. Evid 703 advisory committee's notes.

if the probative value of facts and data "in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Rule 703. In addition, the jury may be given, upon request, a limiting instruction that the information is not to be used for substantive purposes but only to assess the basis of the expert's opinion. See Fed. R. Evid. 703 advisory committee's notes to 2000 amendments. Thus, "when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." *United States* v. *Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971) (en banc); see also *State* v. *Dilboy*, 160 N.H. 135, 150, 999 A.2d 1092, 1104 (2010); *Vann* v. *State*, 229 P.3d 197, 207-08 (Alaska Ct. App. 2010); *State* v. *Gomez*, No. 09-0339, 2010 WL 5173627, at *5-*6 (Ariz. Dec. 22, 2010).

The discretion accorded trial courts to determine the scope and content of expert testimony helps ensure that an expert is the appropriate witness to confront, and not merely a surrogate conveying another's testimonial conclusion. *United States* v. *Johnson*, 587 F.3d at 635-36. Trial courts may evaluate whether the expert can assess the validity of facts or data recorded by others and thus reasonably rely upon them. See Fed. R. Evid. 104(a).

To this end, relevant considerations could include (1) whether raw data or recorded observations exist in their original form and can be interpreted independently; (2) whether the data or observations were generated in a laboratory governed by standards, protocols, or accreditation mandates

that permit independent review and assessment of their quality; and (3) whether and to what extent erroneous data resulting from analyst mistake, incompetence, or even fraud could be recognized as such. See generally Joanne A. Epps, *Clarifying the Meaning of Federal Rule of Evidence* 703, 36 B.C. L. Rev 53, 81-84 (1994).

Post-*Crawford*, state and federal appellate courts nationwide have held that it does not violate the Confrontation Clause to admit testimony by an independent expert who relies upon forensic science testing performed by other analysts. E.g., *United States* v. *Pablo*, 625 F.3d 1285, 1292-94 (10th Cir. 2010); *United States* v. *Johnson*, 587 F.3d at 635-36; *United States* v. *Turner*, 591 F.3d 928, 933-94 (7th Cir. 2010); *United States* v. *Moon*, 512 F.3d at 361-62; *Commonwealth* v. *Barbosa*, 457 Mass. 773, 787 n.12, 933 N.E.2d 93, 108 n.12 (2010) (citing numerous cases in accord). Cases involving other kinds of expert testimony are in accord. E.g., *United States* v. *Law*, 528 F.3d 888, 912 (D.C. Cir. 2008); *United States* v. *Lombardozzi*, 491 F.3d 61, 73 (2nd Cir. 2007).

Upsetting Rule 703 and its state law equivalents based on strained extrapolation of this Court's *Crawford* jurisprudence "would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases." *United States* v. *Johnson*, 587 F.3d at 635. Manifest injustice would result.

C. Additional Evidentiary Controls Ensure Protection of Confrontation Clause Rights

Additional rules of evidence take account of the fact that the regressing line of programmers, technicians, researchers, and theorists from the various fields that contribute to a scientific result typically need not appear as courtroom witnesses in criminal trials. These evidence rules assure that a witness who provides scientific testimony is subject to confrontation.

First, the law permits trial court judges to act as gatekeepers of scientific evidence, screening scientific reasoning and methods relied upon by expert witnesses for both relevance and reliability. *Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U.S. at 589. This filter eliminates the need to test scientific validity further in the courtroom by subjecting to cross-examination the lineages of people whose work contribute to the theories and methods underlying the forensic testing. The proper exercise of this judicial authority within the meaning of *Daubert* means that experts have "'good grounds'" for their testimony because the trial court's finding of "scientific validity" creates "evidentiary reliability."[7] *Id.* at 590, 594-95.

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[7] In jurisdictions that evaluate the validity of scientific evidence pursuant to *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923), the core standard is whether a new scientific technique has "gained general acceptance in the particular field in which it belongs." *Id.* at 1014; see, *e.g.*, *People* v. *Kelly*, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244 (1976).

Second, trial court judges considering the admissibility of proffered forensic scientific evidence can determine whether the expert has the necessary "knowledge, skill, experience, training, or education" to render the opinion at issue. Fed. R. Evid. 702. When the testifying expert does not perform the original forensic testing, this rule and its state counterparts provide the trial court with discretion to preclude testimony from an expert who cannot speak to—and be cross-examined about—factors that contribute to the reliability of data generated in a particular laboratory. Such factors can include those that speak to the original analyst's "honesty, proficiency, and methodology." *Melendez-Diaz*, 129 S. Ct. at 2538.

Third, a trial judge may assess whether "correct scientific procedures were used in the particular case." See, *e.g.*, *People* v. *Kelly*, 549 P.2d at 1244. Qualifying an expert under Rule 702 or comparable state rules may include, as a required showing, that he or she can testify about the quality of the testing process by describing scientific techniques or methods actually implemented by another analyst. Expert opinion that rest on nothing more than blind trust of another analyst's test results can be foreclosed.

These well-developed rules of evidence are designed to facilitate reliable scientific testimony. Witness knowledge of the scientific procedures employed in case-specific testing may be assured under such rules. There is no need to read the Constitution in a way that would preclude otherwise admissible scientific expert testimony should any of the analysts become unavailable.

D. Cross-Examination of A Qualified Expert Other Than the Analyst Provides Meaningful Confrontation

The Confrontation Clause ensures the reliability of evidence by giving defendants a specific procedural opportunity to challenge it through cross-examination. *Crawford*, 541 U.S. at 61; *Delaware* v. *Fensterer*, 474 U.S. 15, 22 (1985). "[T]he main and essential purpose of confrontation is to secure for the [defendant] the opportunity for cross-examination." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678 (1986). But the accused has no right to "cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." *Delaware* v. *Fensterer*, 474 U.S. at 20. The Sixth Amendment does not dictate which expert must testify without regard to the myriad of factors a trial court may consider in determining whether a proffered expert's testimony will present the defendant with a sufficient opportunity to challenge an opinion through cross-examination.

"The reliability of evidence derived from a scientific theory or principle depends upon three factors: (1) the validity of the underlying theory, (2) the validity of the technique applying that theory, and (3) the proper application of the technique on a particular occasion." 1 Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence* 1 (2nd Ed. 1993). The opportunity to explore each area on cross-examination satisfies the Confrontation Clause, even where the expert witness did not perform original testing in the laboratory. Nowhere in that scenario is there the specter of "ex parte in-court testimony or its

functional equivalent" that is prohibited by the Confrontation Clause. *Crawford*, 541 U.S. at 51.

Scientific evidence may be generated and recorded in a manner that permits its reliability to be assessed by a qualified expert other than the original analyst. Effective cross-examination may occur where "the original test was documented with sufficient detail for another expert to understand, interpret, and evaluate the results" such that "the legitimacy of the original analyst's conclusions and interpretations" can be explored and challenged. David H. Kaye et al., *The New Wigmore: A Treatise on Evidence* 64 (Supp. 2010). "[S]cientific evidence can usually be double-checked by other scientists for error or contributing factors . . . ." Imwinkelried & Faigman, *Evidence Code Section 802*, 42 Loy. L.A. L. Rev. at 446.

Of course, sometimes a forensic science opinion may prove unreliable:

> The scientific methodology may be unsound. The testing equipment may malfunction. The testing specimen may be contaminated, either deliberately or inadvertently. The chain of custody may be broken, so that substances are linked to the wrong defendants. The tester may err in conducting the forensic examination or in interpreting the test results. Clerical errors may occur in the transcription and recording of forensic test results, and tester dishonesty may produce deliberate misrepresentation of test results.

Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 492 (2006). There is no basis for the assertion, however, that cross-examination about

such concerns becomes meaningless if not directed to the analysts. In fact, the criminalist who operated an instrument and reported a result may be a less productive witness than an independent expert who can provide a separate perspective on the testing process, who may well have more skill and training in data interpretation than the analyst, and who may know more about topics such as laboratory quality control procedures, standards, and accreditation than the analyst himself. In many cases, the testifying expert may be the person who technically reviewed the original analyst's work in the laboratory, or another member of the laboratory's supervisory team.

Protocols that permit an expert to critically assess another analyst's work are mandated by laboratory accreditation standards, and may exist as well in unaccredited laboratories. Protocols governing blood-alcohol testing, of particular interest here, can permit independent verification of test results reported by another analyst. See Edward F. Fitzgerald, *Intoxication Test Evidence*, at pp. 24-20 to 24-21 (authors confirm a high probability that reported ethanol values were accurate and reliable, "in large part because the reported data were indeed obtained in accord with proper protocol").

Earning accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), [8] requires a laboratory to have

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[8] The ASCLD/LAB accreditation program "inspects, evaluates, and identifies laboratories that meet or exceed national ASCLD LAB standards that ensure that evidence is

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> procedures to protect evidence from loss, cross-transfer, contamination, and/or deleterious change; validated and documented technical procedures; the use of appropriate controls and standards; calibration procedures; complete documentation of all evidence examination; documented training programs that include competency testing; technical review of a portion of each examiner's work product; testimony monitoring of all who testify; and a comprehensive proficiency testing program.

2009 NAS Report, at 198. [9] "[C]ontrols and standards" are quality control measures, which

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examined properly and reported completely. Areas reviewed and inspected under ASCLD-LAB include the operations, management, physical plant, safety, and security of crime laboratories. A key element of the program involves the random selection of case files and all associated analyses, notes, and data gathered. Interviews are also held with case examiners to verify that laboratory procedures documented in the files actually conform with written procedures maintained by the laboratory." Joseph L. Peterson & Anna S. Leggett, *The Evolution of Forensic Science Progress Amid the Pitfalls*, 36 Stetson L. Rev 621, 632-33 (2007) "ASCLD/LAB has been one of the most effective reform mechanisms in forensic science over the last two decades. Only 10 percent of laboratories pass muster on the first inspection." Paul C. Giannelli, *Science for Judges VII: Evaluating Evidence of Causation & Forensic Laboratories: Current Issues & Standards: Regulating Crime Laboratories: The Impact of DNA Evidence*, 15 J.L. & Pol'y 59, 75 (2007).

[9] As of mid-2008, 397 laboratories had earned ASCLD/LAB accreditation *2009 NAS Report* at 199. As of 2005, there were 389 publically funded forensic crime (continued...)

ASCLD/LAB-International standard 5.9 describes as including "reference collections; certified reference materials and internally generated reference materials; statistical tables; positive and negative controls; control charts; replicate testing; alternative methods; repeat testing; spiked samples, standard additions and internal standards; [and] independent checks (verification) by other authorized personnel." ASCLD/LAB Int'l, *Supplemental Requirements for the Accreditation of Forensic Science Testing Laboratories*© 19-20 (2006) [hereinafter ASCLD/LAB Int'l, *Supplemental Requirements*]. A system of quality assurance in laboratories enhances the ability of other experts to critically evaluate forensic science test results reported by others without assuming skill and judgment on the part of the analyst or blindly trusting the functionality of the test.

Of particular importance is the requirement for documentation of test results, set forth in detail by ASCLD/LAB-International standard 4.13.2.5: "Documentation to support conclusions shall be such that in the absence of the analyst, another competent analyst or supervisor could evaluate what was done

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laboratories in the United States. *Id.* at 58. In addition to ASCLD/LAB accreditation, "the National Forensic Science Technology Center accredits individual laboratory programs under the auspices of the International Organization for Standardization (ISO) The National Association of Medical Examiners (NAME) runs an accreditation program for Coroners and Medical Examiner Offices, and the American Board of Forensic Toxicology accredits toxicology laboratories." Paul C. Giannelli, *Forensic Science*, 34 J.L. Med. & Ethics 310, 312 (2006)

and interpret the data." ASCLD/LAB Int'l, *Supplemental Requirements* 10. This principle was key to the Tenth Circuit's recent conclusion that independent expert opinion evidence based in part upon DNA testing performed by another analyst did not violate the Confrontation Clause: "[DNA] analysts are trained to record their data and processes in a manner that allows other analysts to review the information in order to draw an independent judgment about the DNA analysis and to testify to that independent judgment drawn from others' reports." *United States* v. *Pablo*, 625 F.3d at 1294. Recordation of data and conclusions that are designed to permit independent evaluation of their reliability, therefore, goes far in eliminating need for a myopic constitutional focus on the analyst.

This Court, it is true, has said that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Melendez-Diaz*, 129 S. Ct. at 2537. But it is merely petitioner's article of faith, nothing more, which holds that confrontation of the analysts—however many might underlie the expert opinion—must be the chosen instrument for uncovering fraud or incompetence from forensic science in criminal trials. An independent expert witness who did not perform the testing may, in fact, feel less compelled to defend and justify results that are vulnerable to challenge. See, *e.g.*, Zabrycki, *Autopsy Reports*, 96 Cal. L. Rev. at 1116-17 (suggesting that confrontation of a pathologist's supervisor may be more effective than confronting the pathologist who performed the autopsy where the goal is to reveal "any ambiguity in the findings, variations in standard procedure, or problems in the office").

In the end, adequate confrontation of an expert scientific witness depends not as much on what she did in the laboratory as it does on what she knows and how she knows it. The Constitution should not be read to require an artificial focus on "the analysts." That would belie the realities of scientific evidence and dispense with the proven effectiveness of longstanding rules of evidence.

CONCLUSION

The judgment of the Supreme Court of New Mexico should be affirmed.

Dated: January 14, 2011

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

THE STATE OF NEW MEXICO,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Mexico

BRIEF OF RICHARD D. FRIEDMAN, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Curtis Caylor made a testimonial statement that was admitted against Petitioner even though petitioner was never offered an opportunity to be confronted with him. Accordingly, Petitioner's confrontation right was violated. 5

II. Violation of the Confrontation Clause cannot be excused on the ground that Caylor reported the results of a mechanical process. 13

III. Adoption of an unjustified surrogate witness regime is not necessary to preserve an efficient criminal justice system. 17

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Barber v. Page, 390 U.S. 719 (1968) 22

Briscoe v. Virginia, 130 S.Ct. 1316 (2010) 1, 19

California v. Green, 399 U.S. 149 (1970) 22

Crawford v. Washington,
541 U.S. 36 (2004) 3, 6, 7, 10, 17

Davis v. Washington,
547 U.S. 813 (2006) 1, 6, 10

Douglas v. Alabama, 380 U.S. 415 (1965) 8

Giles v. California,
128 S.Ct. 2678 (2008) 1, 2

Hammon v. Indiana (decided with *Davis v. Washington*, 547 U.S. 813 (2006)) 1, 6

Lopez v. State, 974 So.2d 340 (Fl. 1978) 22

Melendez-Diaz v. Massachusetts,
129 S.Ct. 2527 (2009) ..... *passim*

Ohio v. Roberts, 448 U.S. 56 (1980) 17

People v. Dendel, 2010 WL 3385552 (Mich. App. Aug. 24, 2010) 18-19

People v. Dinardo, 2010 WL 3984545 (Mich.App. Oct. 12, 2010) 16

People v. Horton, 2007 WL 2446482 (Mich. App. 2007), *leave to appeal granted*, 742 N.W.2d 124 (Mich. 2007), *and leave order vacated*, 772 N.W.2d 46 (Mich. 2009). 19

People v. Lonsby, 707 N.W.2d 610 (Mich. App. 2005) 18-*19*

People v. Payne, 774 N.W.2d 714 (Mich. App. 2009) 18

People v. Wilkey, 2004 WL 576659 (Mich. App. 2004), *appeal denied*, 691 N.W.2d 454 (Mich. 2005) 23-24

State v. Craig, 853 N.E.2d 621 (Ohio 2006), *cert. denied*, 549 U.S. 1255 (2007) 22-23

State v. Craig, 934 N.E.2d 347 (Ohio 2010) 23

United States v. Lott, 854 F.2d 254 (7th Cir. 1988) 12

United States v. Williams, 2010 WL 4071538 (D.D.C. Oct. 18, 2010) 11

FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 602 9

Fed. R. Evid. 703 11

SECONDARY SOURCES

DEMOSTHENES, PRIVATE ORATIONS (A.T. Murray trans. 1939) 6

Richard D. Friedman, *Is there a multi-witness problem with respect to forensic lab tests*, http://confrontationright.blogspot.com/2010/12/is-there-multi-witness-problem-with.html. 18, 19

Atul Gawande, *The Maggot Talks*, N.Y. Times Book Rev., Sept. 10, 2000, p. 20 15

Parrot May Have the Answer to a Killing, N.Y. Times, Nov. 12, 1993, at B20 15-16

JOHN RAWLS, A THEORY OF JUSTICE (1971) 17

JESSICA SNYDER SACHS, CORPSE: NATURE, FORENSICS, AND THE STRUGGLE TO PINPOINT THE TIME OF DEATH (2001) 15

Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15 (1990) 15

STEPHEN TODD, THE SHAPE OF ATHENIAN LAW (1993) 6

JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (Chadbourn rev. 1979) 9

INTEREST OF *AMICUS CURIAE*[1]

Amicus is a legal academic holding the title of Alene and Allan F. Smith Professor of Law at the University of Michigan Law School. Since 1982 he has taught Evidence law, among other subjects. He is general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, author of THE ELEMENTS OF EVIDENCE (3d ed. 2004), and co-author of EVIDENCE (11th ed. 2009; with Jon Walz and Roger C. Park).

Much of the academic work of *amicus* has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." He has written many articles and essays on that right, and since 2004 he has maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it. *Amicus* successfully represented the petitioners in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010).

As he has previously done in *Giles v. California*, 128 S.Ct. 2678 (2008), *Melendez-Diaz v. Massachusetts*,

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[1] Each party has filed with the clerk a global consent to the filing of any *amicus* brief on the merits of this case. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

129 S.Ct. 2527 (2009), and *Michigan v. Bryant* (No. 09-150), *amicus* submits this brief on behalf of himself only; he has not asked any other person or entity to join in it. He is doing this so that he can express his own thoughts, entirely in his own voice. In some cases, as in *Giles*, his views principally favor the prosecution; in others, as in this case, his views principally favor the defense. His desire, in accordance with his academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.

Amicus believes that the doctrine of the Confrontation Clause would be seriously distorted if it incorporated the theory adopted by the New Mexico Supreme Court. In this case, the prosecution introduced a testimonial statement into evidence against the accused, without offering him an opportunity to be confronted with the witness – that is, the person who made that statement. Accordingly, the accused's confrontation right was plainly violated. Offering a surrogate for confrontation has no basis in law and does not satisfy the confrontation right. Nor is the use of a surrogate witness necessary to allow criminal justice systems to operate efficiently.

SUMMARY OF ARGUMENT

Absent the Confrontation Clause, witnesses could testify against an accused in any number of ways – giving testimony to judicial officials behind closed doors, or to police at the station-house, or in the witness's living room, or by signing a written statement. As *Crawford v. Washington*, 541 U.S. 36 (2004), recognized, the Clause prescribes that only one method of testifying against an accused is acceptable – giving the testimony subject to the accused's opportunity for confrontation and, if reasonably possible, at open trial.

An essential question in a case of this sort, therefore, is this: Is there a person who made a testimonial statement that was used as proof of the accused's guilt notwithstanding the fact that the accused did not have a chance to be confronted with that person? If the answer is in the affirmative, then, with narrow qualifications not present here, the Confrontation Clause has been violated.

In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), this Court held that a forensic laboratory report indicating that a suspect substance was cocaine was a testimonial statement. Accordingly, the Commonwealth violated the Confrontation Clause in that case by introducing the report without the live testimony of the person who made it.

Like *Melendez-Diaz*, this case involves a forensic laboratory report, which the state supreme court recognized as testimonial. Nevertheless, the State failed to present live testimony by the analyst who prepared the report. Nor did the State take a proper

corrective measure, such as deleting the name of the original author from the report and having another witness, who could testify from personal knowledge to the events and conditions recorded in it, adopt it as his own statement. Instead, the State presented the live testimony of another witness, who had no personal knowledge of those events and conditions but in effect relayed them to the jury. This is a blatant violation of the Confrontation Clause.

The theory adopted by the state supreme court – that the analyst who prepared the report was a "mere scrivener," the "true 'accuser'" being the gas chromatograph machine used to test his blood alcohol level – has no merit. In fact, the statement by the absent witness did far more than simply report a machine's read-out; rather, the witness made assertions about the condition of the sample when he received it and the entire process by which he conducted the test. More fundamentally, even if the witness did no more than report what he saw – a report necessary to convey the information generated by the machine to court – that would not diminish the testimonial quality of his statement in the slightest; many witnesses do no more than report what they see.

In short, this is a simple straightforward case: Curtis Caylor made a testimonial statement, that statement was introduced against Petitioner, and Petitioner was never given an opportunity to be confronted with him. Other situations present arguments against applicability of the Confrontation Clause that are not available here – for example, if one lab analyst testifies as to facts observed by another, but without attributing the report to the other analyst, or if one analyst testifies in part on the basis of facts

reported to her by another but without testifying as to those facts. But the Court should not attempt in this case to resolve the law governing these different situations.

The conclusion that the Confrontation Clause requires a given procedure does not depend on a demonstration that the costs of adopting that procedure are reasonable. But *amicus* understands that in determining whether the Clause does in fact require a given procedure the Court might take exorbitant costs as a negative signal; the Clause was not intended to impose unreasonable burdens on prosecutors. In fact, data from *amicus*'s home state of Michigan, which adheres to constitutional procedures, demonstrate that the burden is a modest one, which can be borne easily and without great controversy. Moreover, a state can take various measures to lessen the cost of these procedures.

ARGUMENT

I. CURTIS CAYLOR MADE A TESTIMONIAL STATEMENT THAT WAS ADMITTED AGAINST PETITIONER EVEN THOUGH PETITIONER WAS NEVER OFFERED AN OPPORTUNITY TO BE CONFRONTED WITH HIM. ACCORDINGLY, PETITIONER'S CONFRONTATION RIGHT WAS VIOLATED.

Absent constitutional constraint, a witness could testify against an accused in any number of ways. She might do so in writing, in the manner used by the later

Athenians.[2] *Cf. Melendez-Diaz.* She might do so by making a statement behind closed doors to judicial officials, in the manner used by the old civil law. Or she could make a statement to police officers, in the station-house, *cf. Crawford v. Washington*, 541 U.S. 36 (2004), or in her living room, *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)). Absent constitutional constraint, no particular formality would be necessary to give testimony against an accused; a person might give her evidence very informally, without taking an oath, but under the full understanding that her statement was likely to be used in prosecuting an accused of crime.

Of course, the Confrontation Clause of the Sixth Amendment to the Constitution prescribes that (unless the accused consents) none of these manners of giving testimony is acceptable. The accused has a constitutional right that is violated if the witnesses against him give their testimony in any manner other than the one long required in the common law courts – formally, under oath, face-to-face with the accused, subject to cross-examination, and, if reasonably possible, at the trial itself. *Crawford.*

Accordingly, when the accused contends that his confrontation rights have been violated by introducing a statement made out of court, the essential question is this: Has a statement testimonial in nature been used against the accused even though the accused has

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[2] STEPHEN TODD, THE SHAPE OF ATHENIAN LAW 128-29 (1993); 2 DEMOSTHENES, PRIVATE ORATIONS 46:6, at 247-49 (A.T. Murray trans. 1939). ("The laws ... ordain that [a witness's] testimony must be committed to writing in order that it may not be possible to subtract anything from what is written, or to add anything to it.").

not had an opportunity for confrontation with the witness who made the statement?

This question may be broken down into four parts. First, *was the statement in question testimonial?* It is true, of course, that "the word 'testimonial' . . . does not appear in the text of the Clause." *Melendez-Diaz*, 129 S.Ct. at 2544 (Kennedy, J., dissenting). But the Clause speaks of witnesses, and giving testimony is what witnesses do. Indeed, in many languages, the words for witness and testimony have similar roots. For example, in Spanish they are, respectively, testigo and testimonio; in French, témoin and témoignage; in German, Zeuge and Zeugenaussage. If *Crawford* had spoken of "statements made acting as a witness," the link to the text of the Clause would have been undeniable – but the word commonly used in the English language to express this idea is "testimonial."

There is no doubt that the statement involved here was testimonial; *Melendez-Diaz* establishes that a laboratory report is testimonial if it transmits the information the author would expect to provide if he were called as a witness at trial. 129 S.Ct. at 2532. And *Melendez-Diaz* strongly implies that the critical consideration in deciding whether statements are testimonial for purposes of the Confrontation Clause is whether they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*[3] As in *Melendez-Diaz* itself, there can be no

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[3] As *amicus* has recently contended in a brief filed in this Court, this useful shorthand summary might be something of a simplification. Instead of anticipated use *at trial*, one might speak somewhat more broadly of anticipated use for *prosecutorial purposes*, or for *investigation or prosecution of*

doubt that this standard is met by the statement at issue in this case. Indeed, the state supreme court acknowledged that the statement here is testimonial. Joint Appendix ("JA") at 2, 11-12.

Second, *who made the statement?* In some cases, that may be ambiguous, but not here: The statement at issue was signed by Curtis Caylor. It is plainly his statement; it does not purport to transmit the statement of anyone else. Given that his statement was testimonial, Caylor may be referred to as a witness.

Third, *was the statement used as proof against the accused?* Again, in some cases there may be ambiguity – a statement may effectively be used as proof against the accused even though it is not formally admitted into evidence. *See, e.g., Douglas v. Alabama*, 380 U.S. 415 (1965) (reading of co-defendant Lloyd's confession as part of attempt to impeach Lloyd held to violate confrontation rights of Douglas, notwithstanding the fact that the statement was not admitted against either; reading of the confession "may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement," and "the jury might improperly infer both that the statement had been made and that it was true."). But there is no question

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a crime. Brief of Richard D. Friedman as *Amicus Curiae*, *Michigan v. Bryant*, No. 09-150, at 5 n.3. A more theoretically precise, but perhaps less practicable approach, would be phrased in terms of the anticipation of a reasonable person in the speaker's position on the hypothetical assumption that the statement would be admissible at trial. *Id.* at 12 n.11. In this case, there is no need to resolve any such complexity; the report was clearly intended for use at trial.

here; the statement was formally admitted into evidence, over Petitioner's objection, and in closing argument the prosecutor referred to it. JA 44-47, 57; Petitioner's Brief at 8.

Considering the second and third questions together, it bears emphasis that the critical factor is not that Caylor performed the blood test. Rather, the critical factor is that it was Caylor's statement that was used as proof against the accused. Put another way, a court need not ask "who the analyst is," *cf. Melendez-Diaz*, 129 S.Ct. at 2546 (Kennedy, J., dissenting), but rather, "Who is the witness whose testimonial statement was introduced against the accused?" In this case, that was clearly Caylor. And in this case, only Caylor *could* have given acceptable testimony on the matter in question, because only he observed the performance of the test.[4] But suppose that, though only Caylor *performed* the test, another person also *observed* the performance of it. Then at trial that person could testify instead of Caylor to the performance of the test. Indeed, he could adopt the

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[4] It is a fundamental principle that a witness can testify to a fact only if he has personal knowledge of it. *See, e.g.*, Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 889 (Chadbourn rev. 1979) ("[W]hat the witness represents as his knowledge must be an impression derived from the *exercise of his own senses*, not from the reports of others – in other words, must be founded on personal observation. [¶] This general rule, to which contrary instances can be only casual exceptions, has long been regarded as fundamental . . . .").

report as his own statement.[5] *Amicus* understands it is for this reason that routine practice in some jurisdictions is to have two medical examiners present during an autopsy in a case of suspected murder; if the one who writes the autopsy report is unable to testify at trial, the other one could. Alternatively, in a case involving durable samples, if the prosecution wanted an analyst who was not present for the original test to testify, that analyst could repeat the test.

Finally, *did the accused have an adequate opportunity to be confronted with the witness?*[6] Again, there is no doubt: Petitioner was never given a chance to be confronted with Caylor. Giving Petitioner an opportunity to be confronted with someone else is plainly inadequate. *See Melendez-Diaz*, 129 S.Ct. at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . .").

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[5] If the report is introduced in these circumstances, though, some step should be taken to ensure that as presented to the trier of fact the report constitutes a statement only by the in-court witness and not one by the original author. The safest way of doing this is to delete the name of the original author.

[6] Even if the answer to this question were in the affirmative, the Confrontation Clause would not tolerate use of the out-of-court statement unless Caylor were proven to be unavailable at the time of trial. *Crawford*, 541 U.S. at 68. The prosecution offered no such proof; Caylor was on unpaid leave, JA 58, which certainly made him an unattractive witness from the prosecution's standpoint but did not render him unavailable. Because there is no doubt that Petitioner was never offered an opportunity to be confronted with Caylor, the question of unavailability need not be reached.

Accordingly, this is a simple, straightforward case. Caylor made a testimonial statement that was introduced against Petitioner, even though Petitioner was never given a chance to be confronted with him. The violation of the Confrontation Clause is clear. The Court can therefore decide this case without addressing more complex factual situations that arise in some cases involving forensic laboratory reports.

Suppose, for example, a witness who performed a forensic laboratory test testifies at trial to her observations; she also includes in her testimony a report of observations made known to her by other laboratory technicians, perhaps without identifying them. Is there a violation of the Confrontation Clause?[7]

Or suppose the in-court witness expresses an opinion drawn in part on the basis of information reported to her by other technicians, but does not include that other information in her direct testimony. Federal Rule of Evidence 703 and its state counterparts purport to allow an expert to testify in this manner, provided that the information is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject" – but would application of that Rule, a creation of the late 20th century, violate the

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[7] *Amicus* believes there would be a violation *if* the report of the absent analyst – whether identified or not – to the in-court witness is testimonial in nature. *Cf., e.g., United States v. Williams*, 2010 WL 4071538 (D.D.C. Oct. 18, 2010) (expert "may testify as to his own independent opinion . . . even if that opinion is based in part on the inadmissible autopsy report.").

Confrontation Clause in this context?[8]

Or suppose the in-court witness testifies from personal knowledge about the test that she performed – but she lacks personal knowledge of crucial facts linking the sample to the accused, and the prosecution fails to present any evidence making the link. Given that "gaps in the chain [of custody] *normally* go to the weight of the evidence rather than its admissibility," *Melendez-Diaz*, 129 S.Ct. at 2532 n.1, *quoting United States v. Lott*, 854 F.2d 254, 250 (7th Cir. 1988) (emphasis added), could this gap be so great as to create a constitutional problem – and if so could the gap be filled by the witness asserting without personal knowledge that the sample is linked to the accused?[9]

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[8] *Amicus* believes that – again assuming that the communication from the absent technician to the in-court witness was testimonial – application of the Rule may be unconstitutional; it can amount to using the in-court witness as a conduit for the absent technician's testimony, while suppressing the fact that the absent technician is in fact providing crucial proof against the accused.

[9] *Amicus* believes that in some such situations there could be a confrontation problem. If an in-court witness were allowed to testify without personal knowledge to a factual proposition on the basis of information learned through the testimonial statement of a person who does not testify subject to confrontation, then an enormous loophole in the Confrontation Clause would be opened: A witness could provide testimony against an accused without subjecting himself to confrontation simply by passing it along to another person who would incorporate it in her trial testimony.

On the other hand, no confrontation violation is created if there are gaps in the chain of custody that are small enough that they can be bridged by reasonable

The Court may have to deal with these questions in the future. But this case does not pose them. The Court should treat this case as the simple one that it is – one in which a witness made a testimonial statement that was admitted against an accused but the accused never had an opportunity to be confronted with him.

II. VIOLATION OF THE CONFRONTATION CLAUSE CANNOT BE EXCUSED ON THE GROUND THAT CAYLOR REPORTED THE RESULTS OF A MECHANICAL PROCESS.

The state supreme court paid lip service to the holding in *Melendez-Diaz* that forensic laboratory reports prepared in anticipation of prosecutorial use are testimonial, but immediately attempted to avoid the significance of that holding. The court declared that Caylor

> simply transcribed the results generated by the gas chromatograph machine. He was not required to interpret the results, exercise independent judgment, or employ any particular methodology in transcribing the results from the gas chromatograph machine to the laboratory report.

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inferences on the part of the trier of fact. And that may be true even if during those gaps the substance in question is in the possession of a custodian who not only holds the substance but performs some process on it and who does not testify at trial, so long as the testimony that *is* presented at trial does not effectively incorporate a testimonial statement made by that custodian.

JA 13. Thus, the court said, Caylor was "a mere scrivener," and Petitioner's "true 'accuser' was the gas chromatograph machine"; therefore, it concluded that the live testimony "of a separate qualified analyst" satisfied the confrontation right. JA 13-14. The court erred both on the facts and on the law.

As a matter of fact, Caylor did far more than transcribe the results indicated by the machine. He also asserted that received the sample in question with the seal unbroken and that on *that* particular sample he performed a particular test, according to a protocol described in detail. JA 62-65. These were all matters to which Caylor assertedly could testify from personal knowledge; Razatos, the substitute witness offered by the prosecution, could not, never having observed the sample or the test.

Moreover, *if* Caylor had only transcribed the results indicated by the machine, proof of the test would have been completely deficient. If that is all he had done, the evidence would have been nothing more than numbers on a page. How did those numbers come to be generated? It is crucial to prove that they were yielded by performing a given process on a given substance. Without proof on those points, the prosecution would be offering nothing but numbers in the air. And because only Caylor observed the test, only he was in a position to provide the proof on those points.

Even more fundamentally, the state supreme court erred in concluding that if Caylor did nothing but record the results generated by the machine he would be exempt from confrontation. The output of the machine was a factual condition that Caylor assertedly observed first-hand. When he reported on that condition, in circumstances leading a reasonable

person to recognize that the report would be used for prosecutorial purposes, he testified to it. There is obviously no rule that testimony about a factual condition that a witness observes falls outside the reach of the Confrontation Clause; testifying about factual conditions and events that they have observed is what the largest class of witnesses – percipient witnesses – do. One is "not required to interpret . . . results, exercise independent judgment, or employ any particular methodology" to report, for example, "The door was open," or "I heard a scream." But there is no doubt that testimonial reports of these facts are governed by the Confrontation Clause.

Or suppose the prosecution attempts to prove when a murder victim died through the testimony of a witness that maggots were present on the victim's body at a given time. Clearly the witness's testimony would be subject to the Confrontation Clause. One could not say in a rigorous sense that the "true accuser" was the maggots.[10] The witness against the

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[10] One could speak that way informally, of course. *See* JESSICA SNYDER SACHS, CORPSE: NATURE, FORENSICS, AND THE STRUGGLE TO PINPOINT THE TIME OF DEATH (2001) (ch. 5 titled *The Witness Was a Maggot); see also* Atul Gawande, *The Maggot Talks*, N.Y. Times Book Rev., Sept. 10, 2000, p. 20 (forensic scientists "use the insects at the scene as witnesses to the crime"). But this would not have legal significance; that is, it would not suggest that because the critical evidence was of the presence of maggots the accused had no right to be confronted with the witness who reported on that fact; similarly, in some cases critical evidence is provided by the reactions of bloodhounds, *see, e.g.*, Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15 (1990), or even parrots. *See, e.g., Parrot May Have the Answer to a Killing,*

accused, the one with whom he has a right to be confronted, is the human being who reports on the factual condition. The same is true here. In each case, there has been a physical process that has, according to the report of a human witness, led to a given condition (the presence of maggots in one case, a printout of certain numbers in the other). The prosecution's contention in each case is that the process leading to that result (the life cycle of maggots and the principles of gas chromatography, respectively) is sufficiently understood as to indicate a particular factual condition at a prior time (death and an elevated blood alcohol content, respectively). Neither the state of the maggots nor the output of the machine is itself testimonial, but that is of no significance if these conditions are not reported by a proper witness.[11] In each case, the predicate for the critical deduction is the testimony of a human witness to an observed factual condition. That witness is subject to the Confrontation Clause.

It is apparent that at base the state supreme court's

N.Y. Times, Nov. 12, 1993, at B20. No serious contention could be made that these animals should be deemed to be the "true accusers" and that the accused has no right to be confronted with the witness who reports on those reactions.

[11] Thus, in *People v. Dinardo*, 2010 WL 3984545 (Mich.App. Oct. 12, 2010), the Michigan Court of Appeals held that there was no Confrontation Clause violation when an officer testified to the results yielded by a Datamaster machine without presenting the original ticket printed by the machine. The court held properly that the output of the machine was not testimonial – but in that case, unlike this one, the officer who performed the test (and immediately recorded the results) testified at trial.

"mere scrivener" theory rests on the perception that, though a forensic lab report is concededly testimonial, the report of a machine's output is so unlikely to be infected with error that cross-examination would be of little use. But that, of course, is nothing more than the reliability-centered regime of *Ohio v. Roberts*, 448 U.S. 56 (1980), which was properly rejected by *Crawford*.

III. ADOPTION OF AN UNJUSTIFIED SURROGATE WITNESS REGIME IS NOT NECESSARY TO PRESERVE AN EFFICIENT CRIMINAL JUSTICE SYSTEM.

The argument above is sufficient to demonstrate that, given that Petitioner asserted his rights under the Confrontation Clause, the prosecution could not properly present Caylor's testimonial report without Petitioner having an opportunity to be confronted with Caylor. An assessment of costs and benefits is not necessary to justify that result. *Melendez-Diaz*, 129 S.Ct. at 2540. At the same time, *amicus* recognizes that if a first analysis of a Confrontation Clause issue appeared to yield absurd and impractical consequences, the Court might well reconsider whether the analysis was correct.[12] But the consequences of holding that New Mexico violated the Confrontation Clause in this case are neither absurd nor impractical. *Amicus* understands that a large group of criminal defense lawyers, in another *amicus* brief, is presenting

[12] *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 48 (1971) (using "reflective equilibrium" to refer to an interactive process of adjusting intuitions and general principles in moral reasoning).

extensive evidence demonstrating that many jurisdictions conduct their criminal justice systems efficiently without resorting to an unconstitutional system of surrogate witnesses. This brief will offer some additional evidence and a few supplementary points.

Through a group of student research assistants, *amicus* has conducted an extensive study of trials in Michigan involving charges relating to drugs, of operating under the influence of liquor (OUIL), and rape with penetration.[13] He chose the first two categories because they are the ones in which prosecutors most commonly present evidence of laboratory results, and the last because DNA evidence, one of the most complex forms of laboratory evidence, is presented with considerable frequency in rape prosecutions. He chose Michigan because it is his home state and because it is among those states in which, absent consent by the accused, a prosecutor wishing to prove laboratory results must do so by presenting live testimony – and cannot satisfy this obligation by presenting a surrogate witness who has no personal knowledge of the conduct of the test. The appellate courts have held strictly to this principle[14]

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[13] For a fuller description of the study, including a spreadsheet presenting its results in detail, see Richard D. Friedman, *Is there a multi-witness problem with respect to forensic lab tests*, http://confrontationright.blogspot.com/2010/12/is-there-multi-witness-problem-with.html.

[14] This was true even before *Melendez-Diaz*. *People v. Lonsby*, 707 N.W.2d 610 (Mich. App. 2005) (opinion signed by one judge, the other two silently concurring in the result). It has remained true afterwards. *People v. Payne*, 774 N.W.2d 714 (Mich. App. 2009) (plain error); *People v.*

and, it represents the virtually universal practice of prosecutors.[15] Michigan thus presents a useful forum to study whether rejecting the view adopted in this case by the New Mexico Supreme Court is likely to result in intolerable demands on the judicial system. *Cf. Melendez-Diaz*, 129 S.Ct. at 2544 (suggesting that multiple persons "play a role in a routine test for the presence of illegal drugs").

The study shows – as did a previous one conducted by *amicus* in conjunction with his representation of Petitioner in *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010) – that in the great majority of drug cases there is no need for it to bring in a witness from the lab; sometimes it does not present lab results, and when it does the defense often stipulates to admissibility of a report without live testimony from a lab witness. When the prosecution does bring in a lab witness (in at

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Dendel, 2010 WL 3385552 (Mich. App. Aug. 24, 2010) (concluding that testimony based on a report prepared by non-testifying forensic analysts violated accused's confrontation right, but that error was harmless). In *People v. Horton*, 2007 WL 2446482 (Mich. App. 2007), decided before *Melendez-Diaz*, the court concluded, relying on *Lonsby*, that the trial court had committed plain error by admitting testimony describing laboratory reports and findings of two out-of-court analysts. The state supreme court decided to review the case, 742 N.W.2d 124 (Mich. 2007), but after *Melendez-Diaz* it vacated that decision and denied leave to appeal, 772 N.W.2d 46 (Mich. 2009).

[15] As explained in Friedman, *Is there a multi-witness problem . . . ?*, *supra* note 13, this is the experience reported by lawyers from the State Appellate Defender Organization – and they have only rarely felt the need to challenge what they have regarded as Confrontation Clause violations created by failure to bring a lab witness to trial.

least some cases, and perhaps in most, because the prosecution itself wishes to present live testimony), it never, in the drug cases studied, had to bring in more than one witness for a single test. (In some cases, the prosecution presented the results of more than one test, and most often different analysts had performed those tests.) In all, in the 154 drug cases studied, the prosecution presented a total of 71 lab witnesses at trial – an average of .46 per trial. And, of course, only a very small percentage of cases go to trial.

The picture is much the same in OUIL cases. The percentage of trials in which a lab witness testifies is somewhat higher in these cases than in drug cases. An explanation seems apparent: Only a tiny percentage of OUIL cases goes to trial. Given the relative simplicity of these cases, when one does go to trial it is often because the defense hopes that reasonable doubt may be raised about the lab results – perhaps the chain of custody was not well preserved, or the test was performed so badly that its results are unpersuasive. Nevertheless, it is still true that only in fewer than half the cases – 26 of 55 – did one or more lab analysts testify live at trial, and in the great majority of those cases it was only one lab analyst who did. In only one case did more than one lab witness testify live to a given test result. (In one other case, one lab witness testified live, and three others testified by video conference.) In all the other cases in which more than one lab analyst testified live at a single trial, they were testifying to multiple tests. In sum, in 55 cases a total of 30 lab witnesses testified live, for an average of .55 lab witnesses per trial.

Rape cases provide a different type of context, but in respects material here the picture is largely the

same. In the great majority of the rape cases studied, the prosecution did not present DNA results. DNA testing is more complex than the types of tests typically involved in the other types of cases studied. But the Michigan State Police Laboratory, which does nearly all of the DNA testing used in Michigan prosecutions, is more vertically integrated than many others.[16] And, as in other contexts, it is often true with respect to a given analyst that the prosecution prefers not to present live testimony and the defense does not insist on it. Thus, in some of the rape cases studied, the prosecution presented DNA results without calling a lab witness to testify live. Sometimes it called one live lab witness to present DNA evidence, and sometimes two; it never had to call a long chain of live witnesses from a lab. In sum, in the 104 rape cases studied, 31 lab witnesses testified live – to DNA and other lab results – for an average of about .30 witnesses per case.

The bottom line is clear: When all is said and done, no intolerable burden if created by recognizing that the Confrontation Clause does not proof of a laboratory test to be given, over the objection of the accused, by the testimony of a witness with no personal knowledge of the conduct of the test.

The point is underlined by recognizing that even assuming that the accused insists on his full confrontation rights, a prosecutor has options other than presenting trial testimony of the analyst who initially performed the test.

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[16] Telephone conversation of *amicus* with John Collins, Director, Michigan State Police Forensic Science Division, December 6, 2010.

First, if it is more efficient, the prosecutor may, so far as the Confrontation Clause is concerned, take a deposition to preserve the witness's testimony.[17] (The laws of various jurisdictions may impose additional constraints on the taking of depositions, but of course those jurisdictions may if they wish make depositions more readily available.) If the witness is unavailable to testify at trial, the deposition may then be introduced. If the deposition was video-recorded, the deposition may be introduced by playing the video at trial. Determination of unavailability under the Clause is a flexible matter.[18] In the view of *amicus*, if a lab witness gives a deposition subject to confrontation and the incremental value of having her testify live does not appear substantial, a court can justifiably be reasonably lenient in determining that factors such as distance and inconvenience render her unavailable to testify at trial.

Amicus also believes that, in some cases, depositions may be taken to preserve testimony even before charges are brought. Consider, for example, *State v. Craig*, 853 N.E.2d 621 (Ohio 2006), *cert. denied*, 549

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[17] As explained by the Florida Supreme Court in *Lopez v. State*, 974 So.2d 340 (Fl. 1978), however, granting the accused an opportunity to take a discovery deposition of the witness – as opposed to the prosecution taking a deposition for the specific purpose of preserving testimony – does not satisfy the confrontation right.

[18] *See, e.g., Barber v. Page*, 390 U.S. 719, 724-725 (1968) (requiring "good-faith effort to obtain [witness's] presence at trial"); *California v. Green*, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring) ("The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.").

U.S. 1255 (2007).[19] In that case, Craig was charged with murder several years after the crime; he had been the primary suspect from the start, but before advances in DNA testing technology there was inadequate evidence to bring charges. At trial, the prosecution proved the time of death, a crucial factor in the case, by introducing an autopsy report through a medical examiner who had not been present at the autopsy. This practice should now, in light of *Melendez-Diaz*, be recognized to violate the Confrontation Clause.[20] But *amicus* believes that, if the state was afraid at an earlier time that it might not be able to present at an eventual trial live testimony of the medical examiner who did perform the autopsy, it could have preserved the examiner's testimony by taking his deposition after having given due notice to Craig. In some cases, an ultimate defendant might be able to show that he lacked sufficient incentive or ability at the earlier time to cross-examine the examiner adequately, but that was not true in *Craig*: Craig would have known that he was the primary suspect in a murder case. And he would have had substantially all the information he later had to try to undercut the report's assertion that the decedent died at a time that, other evidence suggested, made him the probable killer.[21]

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[19] *Amicus* represented Craig in his unsuccessful petition for *certiorari*.

[20] The Ohio Supreme Court has perhaps suggested that it realizes this by, *sua sponte*, ordering briefing on the question of whether in light of *Melendez-Diaz* admissibility of the autopsy report violated Craig's confrontation right. *State v. Craig*, 934 N.E.2d 347 (Ohio 2010).

[21] In *People v. Wilkey*, 2004 WL 576659 (Mich. App. 2004),

Second, if the test is on a substance that has not degraded in a material respect, the prosecution may, if it prefers not to present the live testimony of the original analyst, have another analyst re-test the substance and testify at trial. Indeed, *amicus* also understands that in some jurisdictions many lab tests are routinely repeated by a second analyst, thus improving reliability and minimizing the chance that no witness will be available to testify at trial to test results.

Third, as noted above, any qualified witness who *observed* the conduct of the test may testify to it even if she did not actually *perform* the test. In some contexts, it may be impractical to have a second qualified analyst present when the test or examination is conducted. In autopsies, though, it is not only practical but standard practice in some jurisdictions.

Fourth, in some autopsy cases a carefully done video-tape of the entire examination could obviate the need for a live trial witness who had been present at the time of the examination. If the recording is a continuous one that shows the face of the decedent and the entire exam, it may be possible for a witness at trial to identify the decedent and for a qualified expert witness to examine the video and draw material conclusions from it.

These considerations demonstrate that, even in the case of autopsies performed long before an eventual trial, prosecutors can often protect themselves against the loss of evidence without abandoning the principle that the accused has a right to be confronted with a

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appeal denied, 691 N.W.2d 454 (Mich. 2005), the court went so far as to appoint an attorney to take a deposition, of the elderly widow of a victim of felony murder, on behalf of the ultimate but then-unknown accused!

witness whose testimonial statement is used against him. *Amicus* concedes that nevertheless there might be occasional cases in which evidence is lost because the prosecution has no feasible method of offering the accused a chance to be confronted with the witness before the witness becomes unavailable, and no satisfactory substitute. But laboratory witnesses are hardly unique in this respect: Any witness in a long-delayed case may impair the prosecution by becoming unavailable by the time of trial. That is one of the costs that we bear as a consequence of the confrontation right: Assuming that the accused has not wrongfully rendered the witness unavailable, it is the prosecution, which wants to use the evidence against the accused, rather than the accused, who has the right to be confronted with the witness, who bears the risk of that unavailability. Occasional cases, unfortunate as they are, in which genuine unavailability of a witness causes the loss of what may have been a valid prosecution should not provide an excuse for a broad denigration of the accused's fundamental right to demand that witnesses against him testify face to face.

CONCLUSION

For the foregoing reasons, the judgment of the New Mexico Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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v.

NEW MEXICO,

Respondent.

On Writ Of Certiorari To The New Mexico Supreme Court

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE FACTS	3
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. Crime Labs Lack the Standards and Oversight to Control Human Error	12
II. Wrongful Conviction Cases and Crime Lab Scandals Demonstrate the Prevalence of Errors and Fraud in Forensic Analyses	15
A. Incompetence and Negligence Cause Errors	16
B. Bias Causes Errors	19
C. Forensic Results Can Be Fabricated	22
D. Forensic Reports Can Be Incomplete and Misleading	24
III. Blood Alcohol Analysis, Like Other Forensic Disciplines, Is Prone to Human Error	30
A. Training Is Required for Blood Alcohol Analysts and Other Forensic Toxicologists	31

TABLE OF CONTENTS – Continued

Page

B. There Is Potential for Human Error When Raw Toxicological Data Are Generated 32

C. Use of a Machine in Analysis Does Not Correct Human Error 37

IV. Mistakes, Bias and Malfeasance in a Forensic Analysis Can Be Exposed Only Through Confrontation of the Analyst Who Performed the Test 39

CONCLUSION 42

APPENDIX

Innocence Network Member Organizations ..... App. 1

TABLE OF AUTHORITIES

Page

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INTEREST OF AMICUS CURIAE[1]

The Innocence Network (the Network) is an affiliation of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The 63 current member organizations of the Innocence Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, New Zealand, the United Kingdom, and Australia.[2]

Over the past two decades, the Network has helped introduce DNA evidence into courtrooms through its successful exoneration of hundreds of individuals. Drawing on the lessons from these cases, the Network advocates for reforms to ensure that future wrongful convictions are prevented.

It has become clear that problems involving forensic science and their applications are pervasive and mechanisms are needed to prevent forensic error and false information from undermining justice in the courtroom. The misapplication of forensic disciplines and erroneous evidence has played a role in more

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[1] Pursuant to Rule 37.3(a), letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than the amicus curiae, its members, or its counsel made any monetary contribution to the preparation or submission of this brief

[2] The member organizations are listed in the appendix.

than half of the first 225 exonerations proven by DNA testing. In these cases, forensic scientists and prosecutors presented fraudulent, exaggerated, or otherwise tainted evidence to the judge or jury, which led to the wrongful conviction.[3]

This experience has given amicus curiae a particularly strong interest in ensuring that criminal convictions are premised upon valid and accurate forensic science—an interest that is directly implicated by Petitioner Donald Bullcoming's case. When a forensic report, recognized as testimonial by the New Mexico Supreme Court,[4] is offered against a defendant, the author of that testimony must be subject to confrontation. The exoneration cases and several recent crime lab scandals highlight the degree to which forensic error, inconsistency, and fraud frustrate the criminal justice system. They also illustrate the necessity of subjecting the purveyors of forensic testimony—and not their surrogates—to the rigors demanded by the Confrontation Clause.

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[3] *See* Innocence Project, *Facts on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/351.php (listing cases).

[4] *State v Bullcoming*, 226 P.3d 1, 8-9 (N.M. 2010).

STATEMENT OF THE FACTS

In the interest of brevity, amicus curiae adopts by reference the statement of facts as set forth in Petitioner's Brief.

SUMMARY OF ARGUMENT

In courts across the country, forensic science plays a vital role in the fact-finding process. Increasingly, law enforcement and the courts turn to science to solve crimes and adjudicate guilt, while accused and convicted individuals rely on scientific evidence to vindicate their claims of innocence. Nonetheless, the reliability of such evidence—particularly as it is relayed in forensic reports—is not guaranteed. The prevalence of wrongful convictions based on faulty forensic science, and the rash of crime lab scandals around the nation, have shown that the unchecked use of forensic evidence does not come without a price.

In *Melendez-Diaz v. Massachusetts*,[5] this Court made clear that forensic reports are testimonial, and therefore their authors must be subject to confrontation.[6] Indeed, the confrontation of the analyst who prepares the forensic report is *essential* to the

[5] 129 S. Ct. 2527 (2009).

[6] *Id.* at 2532.

fact-finder's ability to evaluate that testimony.[7] That analyst—and that analyst alone—can explain the circumstances and expectations surrounding the analysis, and how those factors impacted the forensic report.

In this case, the New Mexico Supreme Court agreed the blood alcohol report introduced against Mr. Bullcoming was testimonial,[8] but oddly ignored the portion of *Melendez-Diaz* that held that the authors of testimonial reports should be subject to confrontation.[9] Instead, the court found that the in-court testimony of a surrogate analyst, who had nothing to do with generating the forensic report, satisfied the Confrontation Clause and provided sufficient basis for admission of the report. As justification, the court trivialized the importance of confronting the

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[7] Scholars and scientists alike have noted the subjective nature of forensic reports and the need for rigorous cross-examination. In a study of juror responses to the presentation of scientific evidence at trial, Joel Lieberman noted:

> "Without adequate cross-examination, most jurors [are] not cognizant of the potential for observer effects or the importance of proficiency testing and therefore were unable to accurately assess the reliability of the lab."

Joel D. Lieberman, *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?* 14 Psych. Pub. Pol. and L. 27, 50 (2008); *see also* Jessica Gabel, *Forensiphilia: Is Public Fascination with Forensic Science a Love Affair or Fatal Attraction?*, 36 N.E. J. on Crim. & Civ. Con. 233, 239 (2010).

[8] *Bullcoming*, 226 P.3d at 8-9.

[9] *Melendez-Diaz*, 129 S. Ct at 2532, 2538.

testing analyst himself, suggesting that the analyst played no meaningful role in generating his own testimonial statement, and that the gas chromatograph machine used by the analyst was Mr. Bullcoming's real accuser.[10] This departure from confrontation has no doctrinal basis and, just as critically, displays a fundamental lack of understanding about blood alcohol testing and problems with forensic science generally.

Our knowledge of the problems involved in forensic disciplines is evolving rapidly. In the past year, the National Academy of Sciences released a groundbreaking report shattering any perception that the forensic sciences are beyond reproach. Similarly, the wrongful conviction and subsequent exoneration of individuals such as Dwayne Allen Dail,[11] and the disturbing number of crime lab scandals in states such as North Carolina, California, and Virginia, have illuminated the problems of inaccuracy, inconsistency, and fabrication in forensic analyses.

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[10] *Bullcoming*, 226 P.3d at 8-9.

[11] In the case of Dail, a forensic analyst testified at trial that she had found semen on vaginal smears and on panties. On cross-examination, however, the analyst was forced to explain that the semen did not match Dail. Although Dail was subsequently convicted, the testimony of the analyst developed on cross-examination allowed Dail's post-conviction attorneys to discern that an error in analysis was likely. Dail was eventually exonerated by DNA testing, after spending 18 years in prison. Innocence Project, *Know the Cases, Dwayne Allen Dail*, http://www.innocenceproject.org/Content/832.php.

The fact that a machine is used in the course of forensic analysis does not eliminate the specter of human error. Blood alcohol analysis requires skill and diligence, and the analysts who prepare samples for testing and operate testing machines, like any witness, are prone to mistakes, bias and dishonesty. While a surrogate can testify to proper procedure, he is entirely incompetent to speak to implementation of that procedure in a particular case, or to the truth of a testimonial forensic report.

The present case is particularly troubling because so little is known about the analyst, Curtis Caylor, or his work in this case. Mr. Caylor had been placed on unpaid leave at the time of trial, and his surrogate did not know the reasons for his suspension. Mr. Caylor's testimonial report says nothing specific about the steps he followed in conducting his chemical analysis. Consequently, Mr. Bullcoming and the fact-finder were left with no insight on why Mr. Caylor had been suspended, what steps he took to analyze the blood sample in this case, whether he had understood the testing protocol, whether he followed that protocol, or the judgments he made in the course of analysis. The surrogate, speaking in Mr. Caylor's stead, *assumed* a certain test was conducted, that it was based on lab protocol, and that it was performed properly and impartially. These assumptions, however, do not satisfy the Confrontation Clause. Rather disturbingly, the New Mexico Supreme Court ruling would permit a system of professional witnesses to testify in place of a careless or less honest forensic

witness who crafted reports explicitly for litigation. Such a ruling inevitably weakens the truth finding process and diminishes the integrity of criminal adjudications.

Previous decisions of this Court, including *Pointer v. Texas*[12] and *Delaware v. Van Arsdall*,[13] have illustrated the importance of confrontation to verify accuracy and credibility in forensic testing. As recognized by this Court in *Melendez-Diaz*, confrontation of the testing analyst is a basic constitutional safeguard against faulty forensic science.[14] Such a safeguard is only functional, however, when the witness confronted is the testing analyst himself: the person who conducted the test and certified its results. Confrontation of a surrogate is no confrontation at all.

ARGUMENT

Forensic science has the power to illuminate the truth in certain circumstances, but it is by no means flawless, and it should not be used to undermine our traditional means of determining guilt or innocence. Forensic testimony is, at its core, no different from any other testimony. It is the product of human

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[12] 380 U.S. 400, 404 (1965) (addressing confrontation to expose falsehood).

[13] 475 U.S. 673, 682-83 (1986) (addressing confrontation to expose bias).

[14] *Melendez-Diaz*, 129 S. Ct. at 2536-37.

beings, with the same potential prejudices and inconsistencies inherent in any human expression. When forensic testimony is produced for the purpose of litigation and is offered against a defendant in a criminal trial, as it was in this case, the Confrontation Clause plainly requires the author of that testimony to present it personally and be subject to cross examination to ensure its reliability.[15] As a practical matter, confrontation of the forensic analyst is also necessary to help expose pervasive problems in forensic analyses.

In 2009, the National Academy of Sciences (NAS), in response to a Congressional charge,[16] issued a comprehensive report on the forensic science community.[17] The report presented a scathing assessment of forensic science, noting widespread failures in a variety of forensic disciplines. The report attributed failures in individual cases to a range of serious problems, including lax oversight in the crime labs, unscientific methods, biased analysts, incompetence, and misconduct. To illuminate and correct these problems, the report recommended increased neutrality,

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[15] *Id.* at 2537

[16] S. Rep. No. 109-88, at 46 (2005).

[17] The NAS formed a diverse committee of some of the nation's leading forensic scientists, medical examiners, legal experts, and statisticians to address the issue. *See* National Research Council of the National Academies [hereinafter "NRC"], *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press 2009), *available at* http://books.nap.edu/catalog.php?record_id=12589.

transparency, and responsibility in all aspects of forensic analyses, from the development of methods, to implementation of the methods in practice, to reporting of results.

The NAS report stemmed in part from exonerations of the wrongfully convicted, cases that confirm that forensic science errors have played a major role in convicting the innocent. Of the first 225 wrongful convictions overturned by DNA testing, more than 50% (116 cases) involved faulty forensic evidence that went undetected at the time of trial (if in fact a trial occurred).[18] The reasons for forensic errors in the innocence cases are manifold, but the pattern is consistent: a forensic analyst presents false, mistaken, or misleading testimony, and this testimony helps convict an innocent person.

As this Court stated in *Melendez-Diaz*, confrontation of the analyst who prepares inculpatory testimony is essential to the fact-finder's ability to

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[18] The vast majority of criminal cases result in guilty pleas, and forensic evidence in these cases does not receive the scrutiny of a trial. Nonetheless, the DNA exonerations have exposed forensic science errors even in guilty plea cases. *See* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 12 (2009); Innocence Project, *Wrongful Convictions Involving Unvalidated or Improper Forensic Science that Were Later Overturned through DNA Testing*, http://www.innocenceproject.org/docs/DNA_Exonerations_Forensic_Science.pdf.

evaluate that testimony.[19] That analyst is uniquely positioned to explain how various circumstances and expectations affected his or her analysis and reporting. Where ambiguities exist in the written documentation of the analysis, the analyst alone is capable of clarifying them with any degree of certainty. Confrontation provides a critical opportunity for defendants to work backward with the analyst to examine the processes used, and to ensure that the testimony presented in the report is not biased toward law enforcement,[20] but is sufficiently based in science and fact.

Confrontation serves precisely this truth-seeking purpose in blood alcohol cases such as this one. Here, the New Mexico Supreme Court conceded that the blood alcohol report introduced at trial was testimonial, but it paradoxically excused the analyst, who had been put on unpaid leave for unknown reasons, from testifying in person.[21] The court justified its ruling by minimizing the role of the analyst in developing his own testimonial report, referring to the gas chromatograph machine as Mr. Bullcoming's true accuser. In the report, the suspended analyst attested,

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[19] *Melendez-Diaz*, 129 S. Ct. at 2537 ("Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.")

[20] *See Melendez-Diaz*, 129 S. Ct. at 2536 ("A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.")

[21] *Bullcoming*, 226 P.3d at 8-9

at least in general terms, to using a gas-chromatograph testing method to generate the numerical blood alcohol result. The court seemed to ignore the analyst's use of this method and its incumbent opportunities for error, however, when it labeled the analyst a "mere scrivener."[22] In allowing a surrogate to vouch for the unproven result provided in the report, instead of requiring the suspended analyst to testify himself, the court disallowed Mr. Bullcoming any opportunity to determine whether the analyst conducted an accurate, truthful analysis in this particular case, and ultimately, whether the analyst's conclusions had meaningful evidentiary value.

The fact that the analyst used a machine in the final stages of analysis should not excuse him from confrontation. Print-outs from a machine are still the work products of the analyst and may contain within them manifestations of human error that only confrontation of the analyst can reveal. The wrongful conviction cases and recent reviews of the nation's crime labs demonstrate the alarming frequency of these errors, as well as falsehoods in forensic reporting, and thereby signal the importance of confronting the analyst who prepares a report to be offered at trial. A system as authored by the New Mexico Supreme Court—that presumes truthful reporting and competent forensic analysis while concomitantly setting aside core constitutional concerns in the

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[22] *Id.* at 9.

truth-seeking process—has far reaching consequences for a judicial system struggling with endemic problems that persist in forensic evidence.

I. Crime Labs Lack the Standards and Oversight to Control Human Error.

Many forensic errors are attributable to inadequate methods and standards at the crime labs, which in turn stem from inconsistency and subjectivity in the forensic sciences themselves. Despite their portrayal in the media as scientific and unimpeachable,[23] most forensic sciences have little, if any, scientific foundation and are based instead on subjective pattern recognition, intuition, or presumptions that have not been validated.[24] Consequently, the methods, interpretation, and terminology employed by forensic analysts can vary widely within each discipline, and even within a single lab. Because most states do not require that labs be accredited, labs face little pressure to standardize their protocols or ensure that individual analysts are conducting tests properly. This variability makes it difficult to determine, based

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[23] Forensic scientist Thomas Mauriello noted the glamorous portrayal of forensic science on the popular television show CSI and estimated that upwards of forty percent of the so-called forensic science employed on the show simply does not exist. Gabel, *supra*, at 239.

[24] NRC, *supra*, at 22, 187-191.

on test results alone, whether an individual analyst is reaching accurate conclusions.

The NAS report emphasized that most forensic disciplines have never been subjected to rigorous scientific study to determine their accuracy and reliability, noting that "[w]ith the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."[25] Most forensic disciplines lack standard protocols, and in the rare case where protocols are in place, "they often are vague and not enforced in any meaningful way."[26] Even methods with relatively well-established scientific roots, such as DNA and certain chemistry-based analyses,[27] can be the subject of rigorous debate in litigation because the testing protocol may be insufficient to eliminate the risk of sample contamination and other errors in analysis.[28]

In most states, the minimum standards for operating a crime lab do not inspire confidence. According

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[25] NRC, *supra*, at 7.

[26] NRC, *supra*, at 6.

[27] NRC, *supra*, at 7 (noting that certain chemical and biological disciplines have a stronger scientific basis than other disciplines).

[28] *See, e.g., Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2329 (2009) (Alito, J., concurring) (noting virtually all aspects of lab practice in DNA analysis are prone to attack in litigation).

to the NAS report, "Several commentators appearing before the committee noted that nearly anyone with a garage and some capital theoretically could open a forensics laboratory and start offering services."[29] Eric Lander, co-chair of President Obama's Council of Advisors on Science and Technology, has noted, "[C]linical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row."[30]

Only about 10 states require crime laboratories to be accredited according to specific standards for quality assurance.[31] Although accreditation alone cannot guarantee increased quality (as demonstrated in the North Carolina example discussed below) it is one way of monitoring crime lab processes. Labs in states that do not require accreditation may pursue it voluntarily, but are not prohibited from operating if they lose or fail to gain accreditation. In the absence of accreditation, courts have virtually no assurance that the analysts from these labs are properly trained or monitored, or that they perform their jobs properly.[32] The defendant must have the ability, through

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[29] NRC, *supra*, at 193.

[30] Paul C. Giannelli, *Crime Labs Need Improvement*, Issues in Science and Technology Online (Fall 2003), http://www.issues.org/20.1/giannelli.html.

[31] *See, e.g.*, Mo. Rev. Stat. § 650.060 (Vernon 2010); Neb. Rev Stat. § 71-6833 (Westlaw 2010); N.Y. Exec. § 995-b (McKinney 2010); Okla. Stat tit. 74 § 150.37 (Westlaw 2010); Tex. Crim. Proc. Code art. 38.35 (Vernon 2009)

[32] NRC, *supra*, at 193.

confrontation, to determine whether the analyst is competent and truthful.

II. Wrongful Conviction Cases and Crime Lab Scandals Demonstrate the Prevalence of Errors and Fraud in Forensic Analyses.

The NAS report and studies of wrongful convictions illuminate the problems with certain forensic methods, and also the mistakes forensic analysts can make when applying these methods in the lab. In referring to the gas chromatograph machine as Mr. Bullcoming's real accuser, the New Mexico Supreme Court made a critical implicit presumption: it presumed that there was zero potential for human error, fraud or bad judgment when Mr. Caylor prepared the blood sample for analysis, operated the gas chromatograph machine, recorded the results, and memorialized those results in his report. Scientific literature indicates, and courts have confirmed, that this presumption is misguided.[33]

Systematic reviews of forensic labs across the country have further demonstrated the potential for problems throughout the analytical process, from pre-analysis (the work performed before "raw data"

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[33] *See, e.g., Melendez-Diaz*, 129 S Ct. at 2537-38 (citing Paul Giannelli & Edward Imwinkelried, *Scientific Evidence* 532-33, 607 (4th ed. 2007) and James Shellow, *The Application of Daubert to the Identification of Drugs*, 2 Shepard's Expert & Scientific Evidence Quarterly 593, 600 (1995)).

are generated) through interpretation and reporting. In some cases, the problems stemmed from fraud or misrepresentation, but in many others, the problems were attributable to the incompetence or bias of the individual analyst. Regardless of the cause, the end product is faulty forensic analyses.

A. Incompetence and Negligence Cause Errors.

Perhaps the most notorious illustration of forensic incompetence involved an audit of the Houston crime laboratory by the Texas Department of Public Safety in 2006.[34] The audit revealed routine failure by the lab and its employees to run required scientific controls, follow procedures to minimize the risk of sample contamination, document work, and calculate statistics properly. Judge Harry Edwards, co-chair of the committee that produced the NAS report, noted that the Houston case "highlights the sometimes blatant lack of proper education and training of forensic examiners."[35]

The problem of incompetence is not new or isolated. A 2009 study found that invalid forensic

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[34] *See* Roma Khanna & Steve McVicker, *Police Lab Tailored Tests to Theories, Report Says; Investigators Hope to Establish Whether Mistakes Were Deliberate*, Houston Chronicle, May 12, 2006, at A1.

[35] Harry T. Edwards, *Solving the Problems That Plague the Forensic Science Community*, 50 Jurimetrics 5, 9 (2009).

testimony contributed to more than 50% of wrongful convictions.[36] Recent crime lab reviews have uncovered negligence or outright deception among forensic analysts, including blood analysts, in at least 17 states.[37] In 2008, the entire Detroit crime lab was shut down, including the chemistry unit, after an audit revealed erroneous or false findings in 10% of 200 random cases, and a "shocking level of incompetence" in the lab.[38] That same year, Baltimore's crime lab director was fired after investigation revealed that employees had contaminated DNA samples.[39]

Most recently, a 2010 review of the San Francisco crime lab, prompted by allegations that a particular analyst was stealing cocaine from evidentiary samples, revealed several alarming patterns of neglect.[40]

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[36] Brandon Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009).

[37] Maurice Possley, Steve Mills & Flynn McRoberts, *Scandal Touches Even Elite Labs*, Chicago Tribune, October 21, 2004, *available at* http://www.chicagotribune.com/news/watchdog/chi-041021forensics,0,3075697.story.

[38] Edwards, *supra*, at 9 (citing George Hunter, *Workers Rip Crime Labs Closing*, Detroit News, Oct. 1, 2008 at 5B); Paul Egan, *Lab Woes Linked to Theft Case*, Detroit News, March 31, 2009, at 3A.

[39] *See* Julie Bykowitz & Justin Fenton, *City Crime Lab Director Fired· Database Update Reveals Employees DNA Tainted Evidence, Throwing Lab's Reliability Into Question*, Balt. Sun, Aug. 21, 2008, at A1.

[40] Terry Collins & Brooke Donald, *San Francisco Crime Lab Scandal Strains Justice System*, Associated Press, April 3, 2010.

The review found that overworked analysts often left drug evidence in unsecured boxes or lockers, failed to note when evidence was opened for sampling, and failed to calibrate scales when weighing drugs. The drug testing lab was closed indefinitely. Incompetence and dishonesty were exposed in the DNA unit of the San Francisco lab as well. On the eve of a 2008 criminal trial, DNA analysts mixed up an evidentiary sample with a control sample. Subsequent review revealed that lab personnel destroyed records of the mix-up in an apparent attempt to cover it up.[41] San Francisco Police Chief George Gascón admitted his lab was plagued by widespread and substantial negligence and stated rather bluntly, "Anybody who doesn't see the magnitude of this problem is either blind or stupid."[42]

Not all crime lab supervisors acknowledge the potential for error in their labs, however. Earl Washington, Jr., was exonerated by DNA testing after 17 years in prison—9 of them on death row. When confronted with evidence that a DNA analyst at a Virginia state crime lab made an error that led to the denial of Washington's absolute pardon, lab director Paul Ferrara rejected the notion that one of his analysts had made a mistake. "As far as we're

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[41] Jaxon Van Derbeken, *San Francisco Police Crime Lab Accused of Cover-up*, San Francisco Chronicle, December 4, 2010, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/12/03/MN7I1GLK0L.DTL#ixzz17AuloZjh.

[42] Collins & Donald, *supra*.

concerned, there is no error at all except in the minds of [critics] . . . ," Ferrara said.[43] Ferrara refused to conduct a review of the case or of the analyst who made the error. Virginia governor James Gilmore later pardoned Washington, and Governor Mark Warner, Gilmore's successor, ordered the review that Ferrara had resisted.[44] The review confirmed that the DNA analyst had indeed made a serious error.[45] Notably, the review also concluded that the technical peer-review system in the lab had failed because the "technical reviewer did not observe the errors in the processes and the reported results. . . ."[46]

The example of Earl Washington, Jr., illustrates the critical importance of confronting the analyst who performed the test at issue, rather than a supervisor or colleague who is further removed from the test and who may have a motive to minimize the mistakes in the lab.

B. Bias Causes Errors.

Even in labs where analysts are well trained and supported, analysts may still be susceptible to

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[43] Possley et al., *supra*.

[44] *Id.*

[45] ASCLD/LAB Limited Scope Interim Inspection Report 19, Apr. 9, 2005, *available at* http://www.dfs.virginia.gov/services/forensicBiology/externalReviewAuditReport.pdf (on file with authors).

[46] *Id.* at 17.

mistakes because of observer bias, a pervasive problem in crime labs and in clinical testing generally. Observer bias occurs when an individual unconsciously allows emotion and pre-conceived notions to influence the interpretation of data.[47] In clinical trials of new medicines, for example, a scientist's pre-existing knowledge of a drug can skew his or her conclusions regarding the drug's efficacy. Observer bias does not occur consciously and is not something that can be purposefully willed away.[48] Rather, specialized protocols and procedures are necessary to minimize observer bias effects.[49]

In the criminal context, analysts sometimes receive extraneous information about forensic samples that can lead to observer bias and compromise the analyst's objectivity.[50] Extraneous information might include the theory of the case developed by law enforcement, the origin of the samples they are testing, or other evidence regarding the guilt of the suspect. This problem is exacerbated by the pressure an analyst may feel to produce findings favorable to

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[47] NRC, *supra*, at 122-24.

[48] *Id*

[49] *Id.*

[50] *See* I.E. Dror, D. Charlton & A.E. Peron, *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 Forensic Science International 74-78 (2006).

the prosecution.[51] Bias in this context can lead to false inclusions or exclusions, wrongful prosecutions, and failure to pursue true perpetrators.[52] As a result, human cognition and forensic specialists recommend the use of blind testing in criminal cases.[53]

Few crime labs, if any, however, use blind testing or any comparable safeguard in regular forensic testing to guard against bias.[54] Such concerns are at their zenith when law enforcement engages a crime lab to produce forensic evidence for the purpose of litigation. Defendants in criminal cases seldom know

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[51] *See Melendez-Diaz*, 129 S. Ct. at 2536; ASCLD/LAB VA audit, *supra*, at 14, 17 (noting internal and external pressures on a lab analyst that may have led to errors).

[52] Scientists specializing in human cognition have concluded that extraneous information can have a powerful effect on interpretation of forensic data. *See, e.g.*, Robert B. Stacey, *Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case*, 7 Forensic Science Communications (2005); I.E. Dror & J. Mnookin, *The Use of Technology in Human Expert Domains: Challenges and Risks Arising From the Use of Automated Fingerprint Identification Systems in Forensics*, 9 Law, Probability and Risk 47 (2010). In one study, researchers took forensic fingerprints that had been previously assessed by fingerprint experts as matching certain suspects. Dror & Mnookin, *supra*. The researchers then presented these same fingerprints again, to the same experts, but also suggested to the analysts that it was unlikely the fingerprints could be matched to a suspect. Given this extraneous information, most of the fingerprint experts made different judgments, contradicting their own previous identification decisions. *Id.*

[53] *Id.*

[54] *See* NRC, *supra*, at 124, 207

what biasing information an analyst may have received from law enforcement or prosecutors until the defendant has the opportunity to confront the analyst at trial.

C. Forensic Results Can Be Fabricated.

Crime lab scandals have brought to light not only forensic errors, but also the alarming prevalence of "drylabbing," the utter fabrication of scientific results.[55] In drylabbing cases, the forensic analyst reports the results of testing that was never conducted. Like incompetence and bias, instances of drylabbing are not isolated to a small group of labs, but can be found in labs throughout the country.

Many cases of drylabbing occur in toxicological analysis. In San Francisco's 1994 crime lab scandal, a toxicologist was found to have certified evidence as a controlled substance without conducting a chemical test.[56] In Dallas, Texas, police allegedly field-tested a questioned substance and found it to be cocaine; in reality, the substance was powdered gypsum

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[55] *See* NRC, *supra*, at 193; Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases. The Need for Independent Crime Laboratories*, 4 Va. J. Soc. Pol'y &L. 439 (Winter 1997).

[56] *See* Jim Herron Zamora, *Lab Scandal Jeopardizes Integrity of S.F. Justice. Sting Uncovered Bogus Certification*, San Francisco Examiner, Sept. 16, 1994, at A7.

wallboard.[57] The Houston lab scandal described above also included four cases of drylabbing by toxicologists who created false documents to reflect procedures that were not performed.[58]

One of the most egregious cases of drylabbing involved West Virginia State Police laboratory employee Fred Zain.[59] Upon investigation, it was revealed that Zain had repeatedly falsified evidence in criminal prosecutions. At least 10 people had their convictions overturned as a result, and subsequent reviews questioned whether Zain was ever qualified to perform scientific examinations.

Even FBI analysts have engaged in drylabbing. In May 2004, an FBI analyst, Jacqueline Blake, pled guilty to a misdemeanor of making false statements about following protocol in approximately 100 DNA analysis reports.[60]

Melendez-Diaz noted the importance of confronting the analyst who provides false results. This Court rightly found that such an analyst might reconsider

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[57] Thomas Korosec, *Report Hammers Dallas Police*, Houston Chronicle, Oct. 21, 2004, *available at* http://www.chron com/disp/story.mpl/metropolitan/2858764 html.

[58] M.R. Bromwich, *Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room 1* (2007), *available at* www hpdlabinvestigation.org.

[59] *See* NRC, *supra*, at 44.

[60] Possley et al , *supra*

his false testimony when under oath in open court, and that the prospect of confrontation will deter forensic fraud in the first place.[61]

D. Forensic Reports Can Be Incomplete and Misleading.

It is sometimes difficult to distinguish between drylabbing and simple misrepresentation in forensic analyses, because forensic reports generally do not capture the full spectrum of tasks an analyst performs on a case.[62] According to the NAS report, "The norm is to have no description of the methods or procedures used, and most reports do not discuss measurement uncertainties or confidence limits."[63] The NAS report strongly recommended that the reports use standardized vocabulary and that reports describe, at a minimum, methods used, procedures, results, conclusions, and sources of uncertainty.[64] At present, few labs meet that reporting standard.[65] In most cases, the level of detail in a report is dependent upon the analyst who produced it. Where detail is lacking, courts cannot be certain that the tests were properly performed or that important information was not omitted.

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[61] *Melendez-Diaz*, 129 S. Ct. at 2536-37.

[62] NRC, *supra*, at 186.

[63] *Id.*

[64] NRC, *supra*, at 185-86.

[65] NRC, *supra*, at 186

The analyst's report in this case is illustrative. The only information provided by the analyst is the date of analysis, two handwritten digits indicating the analyst's conclusion regarding blood alcohol content, and a checkmark next to a preprinted statement reading, "The seal of this sample was received intact and broken in the laboratory."[66] The report does not discuss the steps of his chemical analysis, and the space for remarks is empty.[67]

Incomplete or misleading forensic reporting is troublingly pervasive. Improper forensic reporting marred the FBI investigation of the 1995 Oklahoma City bombing, for example. A report by the U.S. Department of Justice inspector general's office stated that the conclusions of the analyst in the case, a supervisory agent in the lab's explosives unit, were scientifically unsound, not explained in the body of the report, and biased in favor of the prosecution.[68] The report noted that the analyst was likely biased because he was made aware that the defendant, Terry Nichols, had purchased ammonium nitrate prior to the bombing. Another example of improper reporting involved veteran Washington state DNA analyst John Brown. In 1997, Brown conducted two DNA tests on a rape kit sample, but his final report mentioned only

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[66] JA 62.

[67] JA 62-65.

[68] CNN, *FBI Lab Botched Oklahoma Bombing Evidence*, March 22, 1997, *available at* http://www.cnn.com/US/9703/22/okc.fbi.report/.

the second test.[69] Brown destroyed the draft report mentioning the first test, and falsely claimed that he had never performed it.

Similarly, analysts may report identical results in different ways, even within a single lab.[70] In such labs, it is virtually impossible for one analyst to review the work of a different analyst, especially when the reviewer did not participate in the analysis. It is not enough for the reviewer to state that he, too, is aware of the lab protocols, because the reviewer cannot know what steps were actually taken by the testing analyst in coming to a conclusion. Indeed, the reviewing analyst may not even know the full range of tests that the testing analyst performed.

The problem of incomplete and inconsistent forensic reporting within a single lab, and the role confrontation can play in addressing this problem, is perhaps best illustrated by a recent scandal involving the North Carolina State Bureau of Investigation (SBI) Laboratory. In 1993, Gregory Taylor was convicted of homicide in North Carolina.[71] A forensic report produced prior to conviction stated that a test conducted on samples recovered from Mr. Taylor's

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[69] Ruth Teichroeb, *Oversight of Crime-Lab Staff Has Often Been Lax*, Seattle Post-Intelligencer, at A1, July 23, 2004, *available at* http://www.seattlepi.com/local/183203_crimelab23.html

[70] *See, e.g.*, Chris Swecker & Michael Wolf, An Independent Review of the SBI Forensic Laboratory (2010) (on file with authors).

[71] Swecker & Wolf, *supra*, at 5 (2010).

vehicle demonstrated "chemical indications for the presence of blood."[72] The report omitted the critical fact, however, that the conclusion was based only on an initial, presumptive test, and that subsequent, more sensitive confirmatory tests reflected "negative" or "inconclusive" results.[73] Notably, the serology analyst who produced the report, SBI Special Agent Duane Deaver, did not testify at Mr. Taylor's trial, but his report was admitted through a local police detective, and the detective testified to its (misleading) contents. After the report was introduced, both the prosecution and defense attorneys referred to the evidence as "blood" for the duration of the trial, despite the fact its presence had not been confirmed.[74] Mr. Taylor's eventual exoneration in 2010, the first by the North Carolina Innocence Inquiry Commission,[75] prompted the North Carolina Attorney General's Office to review reporting practices at the lab and to identify why the error had occurred.[76]

The review revealed that analysts at the lab—and later the lab itself—had adopted policies that specifically permitted individual analysts to choose whether to report the results of confirmatory tests for the presence of blood.[77] If an analyst decided, based

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[72] *Id.*

[73] *Id.* at 6.

[74] *Id.*

[75] *Id.* at 5.

[76] *Id.* at 2.

[77] *Id.* at 17-20.

on his or her subjective opinion, that a confirmatory test was inconclusive due to inadequate sample size, the analyst could omit the fact that the confirmatory test was performed.[78] Further complicating the matter, certain analysts at the lab had been trained that there was no such thing as an inconclusive test, and some analysts reported inconclusive results even when their notes reflected a negative test result.[79]

In his testimony before the three-judge panel comprising the Innocence Commission, Agent Deaver stated that the practice of not reporting negative confirmatory blood tests results in the final lab report was the "policy" of the SBI lab in 1993, and that the language used in his lab report was standard verbiage prescribed by SBI and the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), the organization that had accredited SBI.[80] The independent review concluded, however, that the ASCLD/LAB had never provided specific language to be used in a report, despite the fact that analysts such as Deaver had clearly understood that to be so.[81]

In total, the review discovered 230 SBI cases in which the analyst had produced a report that misrepresented test results. In 40 of these cases, no

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[78] *Id.*

[79] *Id.*

[80] *Id.* at 7.

[81] *Id.* at 12

suspect was charged. Out of a total of 269 individuals charged in the remaining 190 cases, 80 were still serving sentences at the time of the review (four were on death row), three were executed, and five died in prison.[82] None of these files contained documentation that relevant lab notes were provided to the accused for review at the time they were charged or before trial.[83]

This scandal starkly illustrates the importance of confronting the analyst regarding his or her own report. Individual analysts may be subject to regulation and protocol, but it is not enough simply to present the jury with the protocols as they stand on paper. Instead, individual analysts must be called to relay their individual understandings of the processes, and what steps they actually performed both in conducting the tests and drafting their reports. In North Carolina, two analysts looking at the same data—namely, negative results for tests indicating the presence of blood—interpreted and reported the data in a number of ways, many of which had dire consequences for defendants.[84]

Further, at least some analysts were mistaken about what the lab protocol provided, and this misunderstanding was not illuminated until the review took place. This could easily be true in the case of

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[82] *Id.* at 3

[83] *Id.* at 4.

[84] *Id* at 3.

Mr. Bullcoming, who has yet to hear Mr. Caylor explain what he understood about the testing methods he implemented in the New Mexico lab, the conclusions he reported, and how he reported them. Confrontation could have permitted this.

The poor quality of most lab reports makes confrontation of the analyst a necessity. Unlike peer-reviewed scientific studies, which typically contain thorough explanations of methodology, interpretations, and sources of error, the usual forensic report, especially in the realm of forensic toxicology, contains only brief, conclusory statements, as this case illustrates.[85] The person against whom the report is offered has no way to determine how the analyst reached his or her conclusions, and in many cases, what the analyst meant by them. These are issues on which a surrogate analyst can only speculate.

III. Blood Alcohol Analysis, Like Other Forensic Disciplines, Is Prone to Human Error.

A blood alcohol analyst is a type of forensic toxicologist who must be well trained and diligent to produce accurate forensic testimony. The analyst who authored the testimonial blood alcohol report in this case, and who had been put on unpaid leave for undisclosed reasons, was excused from confrontation because the New Mexico Supreme Court found that

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[85] JA 62; *see also Melendez-Diaz*, 129 S. Ct. at 2531.

the analyst did nothing more than transcribe numbers from a machine print-out.[86] Crime lab manuals and scientific literature contradict this finding, however, and illustrate that blood alcohol reports are the attestations of the analyst, not a machine. Confrontation of the analyst himself is required to expose the human role in generating the report.

A. Training Is Required for Blood Alcohol Analysts and Other Forensic Toxicologists.

When a lab hires a blood alcohol analyst, it does not hire a typist, it hires a chemist. The American Academy of Forensic Sciences explains that forensic toxicology tests are complex and difficult for laypeople to understand and appreciate, and it recommends that students pursuing entry-level forensic toxicologist positions obtain undergraduate education in chemistry and pharmacology.[87] Forensic labs generally require blood alcohol analysts to have similar academic backgrounds,[88] and several states require that blood alcohol analysts receive state certification, which typically involves training and passage of a

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[86] *Bullcoming*, 226 P.3d at 9.

[87] American Academy of Forensic Sciences, *So You Want to be a Forensic Scientist!*, http://aafs.org/choosing-career#Toxicology.

[88] *See, e.g.*, Colorado Springs Police Department position opening announcement for forensic chemist whose duties include blood alcohol analysis, November 3, 2010, http://www.aafs.org/employment/2010-11-03/forensic-chemist (on file with authors).

proficiency test, to ensure they are performing tests properly and generating sound results.[89] These requirements suggest the analyst must do more than transcribe numbers.

B. There Is Potential for Human Error When Raw Toxicological Data Are Generated.

Raw data in toxicological analyses are the products of human effort and are not infallible. Before raw data are generated, the analyst must perform several tasks to prepare the sample and testing equipment.[90] The process, called pre-analysis, is not automatic and requires diligence and judgment to be performed properly. Human errors in pre-analysis can cause the testing machine to generate false or misleading data, which in turn result in erroneous reports.

The American Board of Forensic Toxicologists (ABFT) recognizes the potential for mistakes in pre-analysis and it requires that accredited labs implement special procedures to minimize such mistakes

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[89] California, Louisiana and Massachusetts are among the states with such requirements. *See* 17 Cal. Code Regs. § 1216.1 (Westlaw 2010); La. Admin. Code tit. 55, pt. I, § 553 (Westlaw 2010); 501 Mass. Reg. § 2.18 (Westlaw 2010).

[90] *See* Rolf E. Aderjan, 6 *Handbook of Analytical Separations: Aspects of Quality Assurance in Forensic Toxicology* 773-75 (Elsevier B.V. 2008).

and to ensure the integrity of the sample.[91] According to the ABFT lab accreditation manual, the toxicologist should begin the process of pre-analysis by checking a wide range of factors, including but not limited to: the external packaging of the vial that contains the blood sample; the vacuum seal on the vial; whether the vial contains anticoagulants and proper preservatives; the expiration date on the vial; the time that passed between collection of the sample and analysis; whether the sample was properly refrigerated prior to analysis; whether the sample appears decomposed; and the sample weight or volume.[92] Lab manuals and vial manufacturers warn that imperfect seals, expired or improper vials, improper refrigeration or extended storage prior to analysis can indicate the sample was not properly preserved and could generate a false result if tested.[93] The ABFT manual also states that the analyst should

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[91] ABFT Forensic Toxicology Laboratory Accreditation Manual 10-12 (2009), *available at* http://abft.org/files/ABFTLaboratory Manual.pdf.

[92] ABFT Lab Manual, *supra*, at 10-12; *see also* Virginia Dept. of Forensic Science, *Toxicology Procedures Manual* 23-26 (2010), *available at* http://www.dfs.virginia.gov/manuals/toxicology/procedures/220-D100%20Toxicology%20Procedures%20Manual.pdf; North Dakota Office of Attorney General, Crime Laboratory Division, *Standard Operating Procedure: Blood Alcohol Analysis* (2008), *available at* http://www.ag.nd.gov/CrimeLab/BloodAlcohol Program/StanOperProcBlAlcoAnaMethod/11-03-08.pdf.

[93] *See, e.g.*, Va. Lab Manual, *supra*, at 23-26; Becton, Dickinson & Co., *Vacutainer Product FAQs, Venous Blood Collection*, http://www.bd.com/vacutainer/faqs/; Harald Schütz et al., *Pitfalls of Toxicological Analysis*, 5 Legal Medicine 6 (2003).

compare the sample label to the accompanying documentation to check for errors in labeling, and each sample should be marked for identification to ensure accurate reporting once the sample is analyzed.[94] Any inconsistencies or problems with the sample should be documented.[95]

An analyst who fails to prepare a gas chromatograph machine properly may cause it to produce false or misleading data. The best-selling gas chromatograph machine in history was made by Hewlett Packard from 1984 through the 1990s, and variants of that model are still in widespread use.[96] The 290-page operating manual for this machine explains the wide range of controls that must be set, checked or measured by the analyst immediately prior to processing of the sample, including but not limited to: the temperatures of the sample injection port, valves, internal tubing and detector; the pressures of various gasses in different parts of the machine; the sample flow rate; the attenuation and range controls; and various elements of the detector.[97] The machine is

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[94] ABFT Lab Manual, *supra*, at 10.

[95] *Id.*

[96] John Buie, *Evolution of Gas Chromatography*, Lab Manager Magazine, Feb. 8, 2010, *available at* http://www.labmanager.com/articles.asp?ID=483.

[97] Hewlett-Packard Company, *HP5890 Series II Operator's Manual* (1994).

highly sensitive, and variations in the controls can affect results.[98]

Many labs require that the analyst inject a series of controls and cleaning solutions into the machine before and after the forensic sample is tested, to flush contaminants and to verify that the machine is generating accurate data.[99] The controls and blood sample must be mixed and diluted in certain proportions.[100] The analyst should invert or rock the sample and controls and then pour them into clean test tubes to view any clotting in the sample and prevent possible contamination.[101] When injecting the sample into the machine, the analyst must start with a clean syringe, bring the sample to room temperature,[102] and measure a precise amount of sample for injection, with air bubbles on either side of the sample in the syringe.[103] The syringe should be injected quickly and

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[98] *Id.* at 73; *see also* Fulton G. Kitson, Barbara S. Larsen, & Charles N. McEwen, *Gas Chromatography and Mass Spectrometry. A Practical Guide* 329-34 (Academic Press 1996) (stressing attention to proper temperatures, gas flow rates, and injection procedure); Gerhard Schomburg, *Gas Chromatography* 155-73 (VCH Publishers 1990) (noting injection port temperatures, improper sample introduction and other factors as causes of peak distortion in a chromatogram).

[99] *See, e.g.*, N.D. Lab Manual, *supra*, at 4-5; Va. lab manual, *supra*, at 49-51.

[100] *Id.*

[101] *See, e.g.*, Va. Lab Manual, *supra*, at 50.

[102] *See* Daniel C. Harris, *Quantitative Chemical Analysis* 538 (W.H. Freeman & Co. 2007); Va. Lab Manual, *supra*, at 50.

[103] Harris, *supra*, at 538.

removed promptly after injection, or the machine may read residue from the needle, which could affect the chromatogram.[104] Certain older machines also require the analyst to mark injection times on paper chart recorders.[105] Newer machines may allow for partial automation of the injection process, but still require proper measurement of the sample and controls to be injected.[106]

Each step required in pre-analysis and calibration represents an opportunity for error. Scientists have documented and categorized human error in chromatography for decades, and much of this research has emphasized the errors that analysts frequently make in pre-analysis.[107] These errors can include mistreatment of the sample, or misuse of the machine, each of which can impact the accuracy of the data generated.[108]

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[104] Schomburg, *supra*, at 160; Dean Rood, *A Practical Guide to the Care, Maintenance, and Troubleshooting of Capillary Gas Chromatograph Systems* 92-93 (Huthig 1991).

[105] Wake Forest College, Department of Chemistry, *Gas Chromatography*, http://www.wfu.edu/chem/courses/organic/GC/index.html.

[106] *See, e.g.*, N.D. Lab Manual, *supra*, at 4-6.

[107] *See, e.g.*, 2 Paul Giannelli & Edward Imwinkelried, *Scientific Evidence* 532-33 (Matthew Bender & Co. 2007) (noting critical errors in gas chromatography/mass spectrometry that will render the analyst's opinion unsound); Schutz et al, *supra*; Rood, *supra*, at 148 ("Without any doubt, the improper setup, maintenance and use of capillary GC systems is the major cause of most chromatographic problems.").

[108] *Id.*

All these points, and several others, can be the subject of a robust cross-examination, but only if the analyst who performed the test is present. Only the testing analyst is aware of how the sample appeared, how he or she prepared it for testing, and how he or she operated the machine in a particular test. The process of testing goes well beyond transcription of the results processed by the machine.

C. Use of a Machine in Analysis Does Not Correct Human Error.

The fact that a toxicologist uses a machine in the course of analysis does not cleanse the analysis of human error. In its opposition to the petition for certiorari, the State concedes that forensic analysts are almost always prohibited from testifying about the determinations or conclusions of a nontestifying analyst, and that several courts prohibit testimony about a nontestifying analyst's "scientific findings and observations."[109] The State argues, however, that the analyst's testimony against Mr. Bullcoming should be admitted absent the analyst because the testimony includes "raw data," a statement of the machine itself.[110] In support of this view, the State cites certain federal and state cases that deem raw data non-testimonial, including a recent New York Court of

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[109] Respondent's Brief in Opposition to Petition for Writ of Certiorari, at 16.

[110] *Id.* at 13.

Appeals case decided after *Melendez-Diaz* that concluded a DNA analyst's report was nontestimonial because it contained no subjective analysis and "consisted of merely machine-generated graphs, charts and numerical data."[111] This line of cases is disturbing.

Machines are operated by humans, and humans make mistakes. The notion that raw data are not subject to such error completely ignores the human role in preparing forensic samples, operating the testing machine, recording results and interpreting them. It is unclear whether the analyst's report in this case was the product of subjective analysis, but it is undeniable that the report was the product of an error-prone, human endeavor. Mr. Bullcoming is therefore entitled to confront the analyst. The use of a machine in the final stages of this analysis does not change this fact, nor does labeling the report "raw data."[112] In this case, the so-called raw data are simply forensic results, produced by a *human*, with the aid of a machine. This would have been a simple point for Mr. Bullcoming to illustrate, if the analyst

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[111] *Id.* at 15 (citing *People v. Brown*, 918 N.E.2d 927, 931 (N.Y. 2009) (noting the analyst's report did not involve conclusions, interpretations, comparisons, or any form of subjective analysis)).

[112] *See, e.g.*, Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post-Crawford*, 19 Crim. Just. 26, 33 (2004) ("[A] lab report is nothing but the affidavit of an expert."); Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 511 (2006) ("There can be no question that forensic laboratory reports are testimonial.").

had been available at trial to explain, first-hand, the functions he performed in preparing the machine and sample for testing.

IV. Mistakes, Bias and Malfeasance in a Forensic Analysis Can Be Exposed Only Through Confrontation of the Analyst Who Performed the Test.

The exonerations of the wrongfully convicted demonstrate that false conclusions in forensic analyses result from a variety of problems, including incompetence, bias, fraud, incomplete reporting, and misleading terminology. Though these problems arise for different reasons, they share two important similarities. First, the effect of these problems is frequently the same: an innocent person is placed behind bars.[113] Second, they are all expressed through the work of the analyst who performed the test. Thus, the full set of facts that can demonstrate whether any of these problems exists in a particular case is within the exclusive purview of a single person: the analyst himself.

This Court has repeatedly held that the importance of the confrontation of witnesses cannot be trivialized. In *Crawford v. Washington*, this Court rejected the theory that unconfronted testimony was admissible as long as it appeared reliable.[114]

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[113] *See* NRC, *supra*, at 37.

[114] *Crawford v. Washington*, 541 U.S 36, 61-62 (2004), *overturning Ohio v. Roberts*, 448 U.S. 56 (1980).

Melendez-Diaz further emphasized that analysts who prepare forensic reports are subject to confrontation, and that a court's assessment of whether the report is reliable is irrelevant to that issue.[115]

Likewise, the importance of confrontation in the forensic context cannot be trivialized given the obvious risks of false forensic testimony. The scientific literature demonstrates that gas chromatograph machines are not self-operating and self-correcting. They require properly trained, diligent operators to work properly and to generate accurate results. Any errors the analyst makes in pre-analysis or in operation of the machine can cause the machine to generate false data. Unless the data are so false as to appear ridiculous on their face, any colleague who reviews the data may fail to recognize the possibility of error. Because of this, confrontation and cross-examination are vital to evaluating the reliability of forensic evidence.

Certain reported cases have demonstrated that a capable defense attorney, through confrontation of the analyst, can expose false forensic data or conclusions. In *State v. Bedford*, for example, a forensic chemist in a pre-trial hearing acknowledged that she did not understand the science behind many of the tests she performed, and that she failed to perform some

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[115] *Melendez-Diaz*, 129 S. Ct. at 2537.

standard tests on blood samples.[116] She stated she did not record certain test results, and at the conclusion of cross-examination, she admitted that her "entire analysis [wa]s absolutely worthless."[117] Similarly, in *Ragland v. Kentucky*,[118] a bullet-lead composition analyst conceded during cross-examination that she had lied in earlier statements. The analyst admitted afterward, "It was only after the cross-examination at trial that I knew I had to address the consequences of my actions."[119] Many more examples undoubtedly exist, but have gone unreported because cross-examination resulted in acquittal.

Unfortunately for Mr. Bullcoming, such cross-examination never occurred at his trial. It is unknown what Mr. Caylor would have testified to had he appeared in court, and we can only speculate as to whether the jury would have found his report more or less reliable had he been exposed to rigorous cross-examination. What is certain, however, is that without testimony from Mr. Caylor himself, the contents of his report, including Mr. Bullcoming's blood alcohol content, should not have been admitted under the Confrontation Clause.

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[116] Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show. She Acknowledged Report Was Worthless In 1987*, Balt. Sun, Mar. 19, 2003, at B1.

[117] *Id.*

[118] 191 S.W.3d 569 (Ky. 2006).

[119] *Id.* at 581.

CONCLUSION

This Court made clear in *Melendez-Diaz* that forensic reports are testimonial, and that their authors must be subject to confrontation. Confrontation of a surrogate is insufficient; the reliability of a forensic report can be assessed only through confrontation of the analyst who prepared the machine, conducted the tests, and drafted the report. Despite the New Mexico Supreme Court's suggestion otherwise, reports that involve the use of machines are still forensic reports, subject to the same problems of human error and interpretation, and with the potential to produce the same troubling results: the conviction of innocent persons.

For all of the foregoing reasons, and those presented by Petitioner, the judgment of the New Mexico Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Association in Defence of the Wrongly Convicted, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, Exoneration Initiative, Georgia Innocence Project, Griffith University Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Indiana University School of Law Wrongful Conviction Clinic, Innocence Institute of Point Park University, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Irish Innocence Project at Griffith College, Justice Brandeis Innocence Project, Justice Project, Inc., Kentucky Innocence Project, Life After Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern

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AMICUS CURIAE BRIEF

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DONALD BULLCOMING,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Writ Of Certiorari To The New Mexico Supreme Court

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL COLLEGE FOR DUI DEFENSE, AND NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. GAS CHROMATOGRAPHY TESTING FOR BLOOD ALCOHOL INVOLVES THE EXERCISE OF JUDGMENT AND PRESENTS A RISK OF ERROR BY THE ANALYST THAT CAN BE DISCOVERED ONLY THROUGH CROSS-EXAMINATION OF THE ACTUAL ANALYST WHO RAN THE TEST 4

A. Overview Of How The Gas Chromatograph Test Works To Determine Blood Alcohol Content 5

B. How An Analyst Can Make Errors During The GC Test That Would Be Unknown By A Surrogate Analyst Testifying At Trial 14

1. Step One: Preparation Of The Sample 14

2. Step Two: Loading The Machine 17

3. Step Three: Selecting The Test Parameters 18

4. Step Four: Interpretation Of The Results 21

TABLE OF CONTENTS – Continued

Page

II. A PROPER CROSS-EXAMINATION WOULD INCLUDE QUESTIONS THAT ONLY THE ACTUAL ANALYST COULD ANSWER 23

III. RECENT CASES CONFIRM THE POTENTIAL FOR ERROR IN FORENSIC LABORATORY REPORTS 27

CONCLUSION 35

APPENDIX

Appendix A – GC Machine & Loaded Autosampler ..... App. 1

Appendix B – Typical Chromatogram & Example of Real Chromatogram ..... App. 2

Appendix C – Example of Computer Screen Viewed By Analyst ..... App. 3

Appendix D – Baseline Drift & Example of Baseline Drift ..... App. 4

Appendix E – Example of How Analyst Can Manipulate the Chromatogram ..... App. 5

Appendix F – Peak Shapes That Can Affect The Validity of the Test ..... App. 6

TABLE OF AUTHORITIES

Page

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Jaxon Van Derbeken, *Lab Employee to Take the 5th in DUI Trial*, S.F. Chron., Apr. 7, 2010 34

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 states. The American Bar Association (ABA) recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to ensuring that criminal convictions are accurate and based upon reliable forensic evidence. NACDL's membership has long relied upon cross-examination as one of the vital means of ensuring accuracy. As such, NACDL is uniquely qualified to offer assistance to this Court in this matter.

Amicus curiae the National College for DUI Defense is a nonprofit professional organization of lawyers, with over 1,000 members, focusing on issues related to the defense of persons charged with driving

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[1] Pursuant to Rule 37 6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief. The parties consented to the filing of this brief

under the influence. Through its extensive educational programs, its website, and its email list, the College trains lawyers to more effectively represent persons accused of drunk driving.

Amicus curiae the New Mexico Criminal Defense Lawyers Association (NMCDLA), the state affiliate of the NACDL, is an organization of criminal defense attorneys dedicated to improving the criminal justice system and to educating its members in the most recent trends in the law. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts of New Mexico. Its members participate in the proceedings of all state and federal courts in New Mexico. The NMCDLA is the only organization representing the interests of the private criminal defense bar in the State of New Mexico.

SUMMARY OF ARGUMENT

In *State v. Bullcoming*, JA 1-27, the New Mexico Supreme Court found that the Confrontation Clause was not violated when the prosecution called a surrogate analyst from the laboratory to testify as to the defendant's blood alcohol concentration (BAC) rather than the analyst who actually conducted the blood alcohol analysis performed in this case. The New Mexico Supreme Court based its decision on its mistaken belief that the blood alcohol analysis performed using a gas chromatograph did not require the analyst who conducted the test to "interpret the

results, exercise independent judgment, or employ any particular methodology[.]" JA 13. In fact, using a gas chromatograph to determine blood alcohol concentration requires skill, knowledge, technique, and independent interpretation to obtain results. Additionally, cross-examination of the analyst who actually performed the test, rather than a surrogate analyst, is the only way to probe whether the test results are accurate. Furthermore, well-documented, real life examples of cases around the country demonstrate that errors occur in this type of forensic testing and illustrate why cross-examination of the analyst who actually conducted the test is the only way to expose these errors. While criminal defense attorneys do not take every case to trial, and when they do, they do not always challenge the forensic evidence presented by the prosecution, in those cases where the criminal defense attorney does challenge the forensic evidence, the only person who can provide the necessary information for meaningful cross-examination is the analyst who actually performed the forensic testing at issue.

ARGUMENT

I. GAS CHROMATOGRAPHY TESTING FOR BLOOD ALCOHOL INVOLVES THE EXERCISE OF JUDGMENT AND PRESENTS A RISK OF ERROR BY THE ANALYST THAT CAN BE DISCOVERED ONLY THROUGH CROSS-EXAMINATION OF THE ACTUAL ANALYST WHO RAN THE TEST.

Petitioner Donald Bullcoming was convicted of aggravated felony DWI after a report stating the results of a blood alcohol analysis was admitted into evidence indicating that his BAC was .21 gms/100ml. JA 1, 4. At trial, rather than calling the analyst who actually conducted the test to introduce the evidence regarding Mr. Bullcoming's blood alcohol concentration, the prosecution called a different analyst who took no part in the blood alcohol analysis. JA 6-7. The New Mexico Supreme Court held that calling this surrogate witness rather than the analyst who conducted the test did not violate the Confrontation Clause because blood alcohol analysis was a simple test where the actual analyst was "not required to interpret the results, exercise independent judgment, or employ any particular methodology[.]" JA 13. Blood alcohol analysis is not the simple, mindless test the New Mexico Supreme Court claims it to be. A blood alcohol analysis is a complex test that is run using a gas chromatograph (GC).[2] GC

[2] In this brief "GC" is used interchangeably to describe gas chromatography, the process, and the gas chromatograph device.

is not like a cash register, where anyone can enter numbers and get a receipt with the total amount. Rather, GC is highly technical, complicated, and vulnerable to the possibility of error or fraud, including the ability to surreptitiously manipulate the data. Therefore, this Court should find that only the opportunity to cross-examine the actual analyst who ran the test satisfies the Confrontation Clause.

A. Overview Of How The Gas Chromatograph Test Works To Determine Blood Alcohol Content.

GC is a method of separating a complex mixture into its component parts and quantifying them after separation.[3] *See generally* Harold M. McNair & James M. Miller, *Basic Gas Chromatography* (John Wiley and Sons, 2d ed. 2009); David T. Stafford, *Chromatography, in Principles of Forensic Toxicology* 89 (Barry Levine ed., 4th ed. 2003).[4] A carefully prepared blood sample from the defendant is placed into a small vial. This vial is typically loaded into a carousel that holds many vials that are placed in the GC[5] for a single run. *See* Appendix A. At least three vials of known stand-

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[3] GC separates volatile substances, i.e., that are capable of being vaporized.

[4] The discussion in Section I regarding how GC works is based on the information in these treatises.

[5] The carousel is part of an autosampler that attaches to the GC and automatically samples multiple vials in sequence.

ards – prepared samples of ethanol[6] where the concentration of ethanol in each standard is known (the external standards) – are also placed in the GC. Vials containing water (water blanks) are also placed in the GC. Each vial other than the water blanks is also injected with precisely the same amount of a similar substance not expected in the sample, usually n-propanol, to serve as an internal standard. The purpose of the internal standard, if performed properly, is to help ensure that the reported results are precise and accurate. It is an important safeguard against an invalid result. As there is a known amount of internal standard added to every test vial, if over the course of sampling one vial has more or less internal standard than there should be, then the result (meaning the ethanol amount) is scaled or corrected to account for error. If an incorrect amount of internal standard is added, the surrogate may not know about this dangerous form of error that could result in invalid results being reported as valid results.

The GC machine injects a single syringe through the rubber *septa* into the closed vials in sequence to remove a small amount of the gas in the top of each vial above the liquid (this is known as the *headspace gas*). To move this sampled gas into the machine for

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[6] Ethyl alcohol or ethanol is the type of alcohol found in alcoholic beverages. Ethanol will primarily be used in this brief to avoid confusion with other types of alcohol such as methanol or isopropyl alcohol

analysis, there must be pressure to force it to move. This sampled gas is transferred or pushed by a carrier gas, usually helium, into the *column*. Initially, the gas that is pushed into the GC contains different compounds that are widely dispersed throughout the sample.

The GC *capillary column* (the kind of column most frequently used in forensic blood alcohol testing) is an almost hair thin and feather light hollow coil that is installed in the GC oven, and is coated on the inside with a film of a chemical designed to interact with the injected gas.[7] McNair & Miller, *supra*, at 85. The inner coating is referred to as the *stationary phase*.[8] The gas moves under constant pressure and temperature causing the different molecules in the gas, most importantly the ethanol, to group together uniquely and move at unique rates of speed from other like molecules, based on their interactions with the stationary phase of the column. *Id.* The

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[7] The column length and width, the thickness of the film, and the installation of the column all affect the results. After repeated use, the ends of the columns, which in this kind of testing are usually around 30 meters long, may become dirty, need to be clipped in a specified manner so as to eliminate the chance of contamination, and reinstalled in the gas chromatograph. Only the analyst knows how the clipping or the installation occurred. *See* David T. Stafford, *Forensic Capillary Gas Chromatography, in Forensic Science Handbook, Vol. II*, at 46 (Richard Saferstein ed., Prentice Hall 1988).

[8] Scientists use a number of terms in connection with GC in ways that may be confusing to lay persons. For example, the term "phase" as used here is a noun, and does not refer to a stage of development like adolescence.

mixture of chemicals in the sample gas separates into the different molecules that make up the gas. Each of these separated groups of molecules will then be pushed to a detector at the end of the column. The detector does not sense what each chemical is, or how much of that chemical is present in the sample. Instead, it detects when a group of like molecules emerges and the relative amount of these molecules compared to the other chemicals in the sample gas. It is literally a flame that is ignited throughout the analysis. As the molecules pass through the flame, they are burned. It is the relative change in the intensity of the flame that is measured.[9] A computer then takes this raw data and creates a separate chromatogram for each vial in the run.[10]

The chromatogram is a graph that shows when each molecule makes contact with the detector at the end of the column. Different kinds of molecules will reach the detector to be burned at different rates depending on the size, shape, and other properties.

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[9] Technically, a device called a flame ionization detector (FID), burns the compounds as they exit the column, and creates ions which are measured by the FID. FIDs are the most commonly used detectors in GC testing for blood alcohol content. Stafford, *Chromatography, supra*, at 103-104.

[10] The GC process described is known as indirect headspace gas chromatography. This is the most prevalent type of GC testing for blood alcohol concentration. However, there is another method of GC called direct injection chromatography where a sample is injected directly into the heated injector port and the liquid vaporizes instantly into a gas. Then the gas is pushed into the GC column and measured in the same way it is measured in indirect headspace gas chromatography.

The *retention time* is the length of time that it takes the separated compound to go from injection to detection through the gas chromatograph. Each different chemical component will exit the column at a different rate. The chromatogram is a graph that ideally shows sharp, symmetrical peaks at different points in time representing the different kinds of molecules emerging from the column. *See* Appendix B. The time it takes for a peak to appear in the known samples of ethanol is then compared with the chromatogram for the defendant's sample. If a peak appears in the defendant's sample at the same time that the peak appears in the known ethanol samples, then the defendant's blood sample also contains ethanol. Thus, determining whether ethanol is present in the defendant's blood sample is done by comparison to the known ethanol standards – it is not simply sensed by the GC.

A helpful analogy used to explain how a GC works is the ball analogy. Imagine you live in a house that has a downward-sloping driveway. At the bottom of this driveway, you put a pile of different types of balls, which rest there. Assume that this pile includes all different types, kinds, and sizes of balls, with different surface areas and textures, such as ball bearings, marbles, ping pong balls, golf balls, wiffle balls, handballs, tennis balls, hockey pucks, baseballs, soccer balls, volleyballs, basketballs, footballs, and bowling balls. The balls represent each different chemical component in a mixture. You want to find the bowling ball, so you can go bowling later in the afternoon, but you are blindfolded. The bowling ball

represents the ethanol in a mixture. You are not allowed to touch the group of balls, but you have a tool to help separate them out: a leaf blower. You know that based upon a distinctive attribute (in this case, its weight), it will take a very powerful leaf blower to cause the bowling ball to move, in contrast, for example, to the wiffle ball. You attempt to move this motley collection of balls up the driveway with a normal leaf blower. Some of the pile will quickly move to the top of the driveway, some balls will migrate at varying speeds, and some balls may take an eternity to reach the end of the driveway, including the bowling ball.

The difference in the time that each type of ball takes to travel to the top depends upon the characteristics of each ball, such as the surface area, the weight, etc. Obviously, the lighter balls travel more quickly. The heavier ones might take much longer. Some balls may take longer due to their shape, like the hockey puck or the football. In addition, the different balls interact with one another, as they are pushed by the air from the leaf blower, and this interaction may hinder or accelerate the travel of different balls in different ways. The surface characteristics of the ball, such as a fuzzy versus a smooth texture, may also be important, as in the examples of the tennis ball and golf ball. Even the temperature and composition of the driveway itself may lend itself to the relative migrating speed of balls with certain characteristics, while retarding the progress of others.

Studying all of these many separate physical events that affect the speed at which various balls make it to the top of the driveway would produce a sort of "separation science." Once all of the variables and characteristics were established, and the resulting speed of each ball was noted, then one should be able to do the reverse. In other words, if a person begins by measuring the speed with which a given ball has reached the top, then he or she should be able to extrapolate the ball's unique characteristics, identifying it as a tennis ball, a golf ball, or the sought-after bowling ball.[11]

GC not only determines whether ethanol is present in the defendant's blood sample, but also how much ethanol is in the blood sample – or the concentration. To determine the concentration, the area of the peak that represents ethanol on the chromatogram is measured. Each peak is ideally like a sharp, steep triangle.[12] The greater the area of this triangle, the greater the amount of ethanol is present in the defendant's blood sample. *See* Appendix B. The computer that is either in or attached to the GC may make corrections to the size of the unknown sample's peak based on a comparison of the internal standard in the subject sample to the internal standard

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[11] This analogy can be attributed to Dr. Harold McNair, Ph.D., professor emeritus at Virginia Tech.

[12] The peak is actually a bell curve representing how much of the separated substance is detected at a given time from its injection into the GC.

measurement in the other samples, if the internal standard measurement is not exactly the same in every result. *See* Appendix C.

It is important to note that the area under the peak represents the concentration. How one determines the area is crucial to the end result as more area results in a higher concentration. The baseline is critical in the calculation of the area as it is the boundary of that measurement. *See* Appendix D. The analyst can tell the computer how to draw the baseline of the peak. *See* Appendix E. It is part of the *method*[13] typically or can be something that is performed on a peak-by-peak basis. This is a wholly subjective task. In forensic science and even in industry there are no universal guidelines as to how to determine the baseline of a peak. The computer can also draw the baseline of the peak. If there are irregularities in the shape of the peak – it is not precisely symmetrical, or two peaks overlap – these baseline calculations may be erroneous. *See* Appendix F. The software also permits the analyst to override the method and manually redraw the baseline. With rare exceptions, the reporting of the baseline and what parameters the analyst used in determining the baseline are not reported or known to anyone else.

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[13] "Method" in this context is the term used by the computer software for the computer program the analyst must select that contains the parameters used in the test.

The area of the peak is then compared to at least three known ethanol standards which are plotted on a graph in what is called a *calibration curve.*[14] Richard Erwin, *Defense of Drunk Driving Cases: Criminal/Civil* at 17-31 (Matthew Bender, 3d ed. 2007). If one known ethanol standard is a sample with .08% ethanol, and another is .16% ethanol, and another is .32% ethanol, then the area of the peak from the defendant's blood sample is measured against the calibration curve from the known ethanol standards. The unknown sample (the defendant's sample) must also be within the lowest and highest known external standards for a valid result. Stafford, *Chromatography*, *supra*, at 115.

The software in the GC's computer will analyze the chromatograms and determine if, when compared to the known ethanol standards, ethanol is present in the defendant's blood sample and what the blood ethanol concentration is in the sample compared to the known ethanol standards. Erwin, *supra*, at 17-35. The machine prints out the actual chromatogram and a result based on its calculations.

The results calculated by the computer, however, are not necessarily valid. Many different factors in the control of the analyst can affect the validity of the results. GC is a process that requires several steps. Each tier of the process of testing by GC involves the

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[14] Again, the scientific nomenclature can be confusing to lay persons. The calibration curve should actually be a straight line.

exercise of judgment and proper technique, and presents a risk of error by the analyst that can be disclosed only through cross-examination of the actual analyst who performed those steps in sample preparation. First, the analyst must *prepare* sample vials for GC by *pipetting*[15] precise amounts of samples, internal standards, calibrators, or controls into the vials and then sealing them. Second, he or she must properly *load* the vials into the machine. Third, the analyst must *select* the proper parameters that will be used to run the test. Finally, he or she must *interpret* the results (called *integration*). Human error can occur during each of these stages of the test.

B. How An Analyst Can Make Errors During The GC Test That Would Be Unknown By A Surrogate Analyst Testifying At Trial

1. Step One: Preparation Of The Sample

The process of analysis of ethanol in the blood by GC begins long before the instrument analyzes the sample. Preparing the sample that will be analyzed by the GC machine requires several steps. First, on

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[15] "Pipetting" is a technique where a chemist uses a properly calibrated pipette – a small tube with suction on one end (like a tiny turkey baster) – to extract a minute (usually 1 milliliter in this context) and precise volume of liquid from one container into a vial. Today's pipettes are more sophisticated than turkey basters, and contain dials to specify the desired amount of liquid to be pipetted. But pinpoint accurate pipetting still requires training and is susceptible to error

receipt of the specimen, the analyst should ensure that the identifying information on the sample corresponds to its packaging. Next, the analyst should look for conditions that could affect the reliability of the analysis including leaks, blood volume, clotting, and signs of fermentation. A.W. Jones & J. Schuberth, *Computer Aided Headspace Gas Chromatography Applied to Blood Alcohol Analysis: Importance of Online Process Control*, 34 J. Foren. Sci. 1116 (1989). Clotting will lead to a false high result, because the standards that the unknown are compared against are designed to test for whole blood and not the serum resulting from clotting. Fermentation can lead to a false high result because ethanol can actually be created in the sample after it is withdrawn from the defendant. Philip Blume & David J. Lakatua, *The Effect of Microbial Contamination of the Blood Sample on the Determination of Ethanol Levels in Serum*, 60 Am. J. Clin. Path. 700, 701 (1973).

It is completely within the judgment and diligence of the analyst whether any condition observed rises to a level that needs to be documented, and whether any indication of such condition will ultimately appear on a report or other documents reviewed by a subsequent reviewer. Moreover, the analyst must be trained to be aware that these conditions may affect a test result. It is the lack of this awareness that can be skillfully exposed only by cross-examination of the analyst.

Then appropriate known ethanol standards must be selected which have been properly prepared and

preserved, are within their useful shelf life, and remain within acceptable precision and bias. This includes the ethanol standards of known concentration and the internal standard against which the unknowns will be measured. Next, the specimens and standards must be allowed to reach room temperature. Unequal temperature may lead to unequal sampling volumes. If the volume of the defendant's blood sample is different from the known ethanol standards, then the results will be invalid. All of the vials must contain the same volume of liquid for the test to work properly. In addition, the specimens should be rocked or gently inverted to assure the sample is homogenous. Jones & Schuberth, *supra*. However, if the vials are vigorously shaken, this can cause bubbles in the sample which will increase the volume of the sample and lead to invalid results.

The analyst must then properly prepare the vials that go into the autosampler. The analyst, using a properly calibrated pipette, must introduce the blood and the external standards into the separate 20 milliliter (ml) headspace vials. Then, also using a pipette, he or she introduces a precise volume of internal standard into every vial, with the exception of the water blank vials. The manual pipetting of these solutions in such small volumes is inherently fraught with the potential for error. Care must be exercised to assure consistent samplings of both the specimen and the internal standard. Consistency is critical to precision and reproducibility. M.J. Luckey, *Headspace Analysis for Ethyl Alcohol in Blood,*

Breath, and Urine Specimens Using a Specialized Gas Chromatograph, 16 J. Foren. Sci. 120 (1971). This depends entirely on the pipetting technique of the analyst. In addition, the final mixtures that are introduced into the vials are *never* directly measured and validated prior to the run to confirm that the volume or the mixture was correct. For this reason, pipetting may well be the Achilles' heel of blood alcohol testing. Additionally, if a reusable pipetting system is employed, special care must be taken to prevent contamination. Questioning the actual analyst who prepared the vials is essential to uncover pipetting errors.

2. Step Two: Loading The Machine

It is also important that the GC vials are loaded in the machine correctly. The GC vials must be identified as to their order and contents. Jones & Schuberth, *supra*. "Special precautions must be taken to eliminate the risk of mix-up of samples and to ensure a high degree of quality control of the day-to-day analytical results." *Id*. at 1125.

Such special precautions include that "the positions of samples and standards, the identity of the samples, the concentration of standard and the instrument number are all entered into the computer and carefully checked for possible misidentification." H.M. Stone, et al., *Blood Alcohol Analysis by Semi-Automated Computerized Gas Chromatography, in Alcohol, Drugs, and the New Zealand Driver* 17-18

(Dep't of Scientific and Indus. Research, DSIR Bulletin 232) (1982). The proper labeling and placement of the vials in the autosampler is not only necessary to determine which blood samples belong to which defendants, but it is also essential that sufficient calibrators, controls, and water blanks be placed in their proper places in the autosampler to protect the integrity of the test. Additionally, sufficient water blanks must be dispersed throughout the autosampler to provide assurances against contamination between samples and in the equipment. A salt such as sodium chloride is sometimes added to force extra ethanol and internal standard into the headspace gas. D.S. Christmore, et al., *Improved Recovery and Stability of Ethanol in Automated Headspace Analysis,* 29 J. Foren. Sci. 1038 (1984). Variations in the amount of salt introduced can cause invalid results. B.L. Glendening & R.A. Harvey, *A Simple Method Using Head-Space Gas for Determination of Blood Alcohol by Gas Chromatography,* 14 J. Foren. Sci. 136 (1969). Once again, the correct performance of these activities lies only within the personal knowledge of the person who performs them. *Id.*

3. Step Three: Selecting The Test Parameters

There are several variables in the test that can affect the results. The way an analyst controls these variables depends on the method of GC used. There are two common methods for introducing the sample into the column of the GC. *Direct injection*

chromatography involves injecting the sample directly into a heated injector port, which is set at a temperature calculated to instantly vaporize the sample into a complex gaseous mixture to be separated. The temperature of the oven and column can be regulated by control software that requires analyst input to reduce temperature fluctuations that affect retention time. Additionally, some direct injection methods cause build-up of contaminants in the instrument, which must be periodically cleaned or replaced, and care must be taken to clean the syringe between injections. Glendening & Harvey, *supra*; *see also* K.D. Parker, et al., *Gas Chromatographic Determination of Ethyl Alcohol in Blood for Medico-Legal Purposes*, 34 Anal. Chem. 1234 (1962).

The second, and most common method of GC analysis, is *indirect* or *headspace gas chromatography* (HS-GC). This is the method explained previously in section IA. When this method is used, the defendant's prepared blood sample vial is inserted typically into an autosampler in its proper place with the known ethanol standards and the water blanks. The indirect GC requires that all variables, including temperature, pressure, and flow of the gas through the machine, be kept constant throughout the test. If there are pressure leaks, temperature variations, or changes in the rate of the flow of gas during the test, the results will be skewed because the area of the peaks upon which the accurate quantitation depends will be altered, and a seemingly valid result will be invalid.

Once the carefully prepared samples are placed in the correct positions in the autosampler, the analyst must select the appropriate computer program, called the *method*, to *drive* the sample through the instrument. The program specifies the parameters that govern the test. However, the analyst can also individually set these parameters overriding the installed method. These critical components of the test include, but are not limited to, pressure, the way the samples are shaken, incubation period and variables surrounding the headspace vial, the temperature of the injection port, the temperature of the oven that contains the column, the temperature of the detector, the flow rate, and the *split ratio*.[16] A surrogate analyst will not know if the actual analyst changed any of the test parameters or the reasons for doing this. It is essential that the defense attorney be permitted to question the analyst about the parameters used during the test to determine if the results of the test are valid.

Moreover, an autosampler uses a single injector needle, which is reused with every sample. This invites the possibility of sample carryover contamination. The precautions the analyst takes to protect

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[16] The "split ratio" is the ratio of the amount of gas that the machine will use to push through the GC column and test versus the amount of gas it will discard through a specially designed filter of sorts called a split injector. Only a minute amount of the gas extracted from the headspace vial actually goes through the GC column.

against contamination, known only to the analyst, are also important.

Many laboratories today use duplicate testing with *dual columns* as an additional check of accuracy and reliability, where all samples are split and tested once through each column. It is important to note that each column is different in length and inner coating, and represents a completely separate set of parameters. Only the final result from each individual column can be compared for purposes of assessing accuracy and validity. A few laboratories even go so far as to have each blood specimen tested by two different analysts, using two different pipetting systems, and two batches of internal standard, and on separate gas chromatographs, in order to completely isolate and detect individual errors in technique.

4. Step Four: Interpretation Of The Results

The GC measures the rate at which the chemicals in the sample emerge. This data is collected by the computer, but not reported in its "raw" form, but rather interpreted and manipulated by the software that is the reporting system whose variables are loaded and can be changed by the analyst at any time, even after testing is completed. It is only after this software interpretation that calculation of the peak areas occurs which determines the concentration of ethanol in the defendant's blood sample.

Importantly, the software, which is designed to *correct* for anomalies in the testing procedure, sometimes adjusts the results incorrectly. These *corrections are not always correct* and must be carefully monitored.

One way errors can occur is through a redrawing of the baseline by the computer or the analyst if the peaks are not precisely symmetrical or where the peaks overlap and relate to more than one substance. In this way, the software allows for manipulation of the raw data by the computer or the analyst. Thus, rather than doing the scientifically honest thing and noting the anomalies, determining the source of the error, fixing any problems that would cause problematic results, and retesting over again, an analyst could simply manipulate any resulting anomalies in the chromatogram to make it appear normal and in line with the analyst's preferred or expected results. Skillful cross-examination of the actual analyst could expose these errors, of which a surrogate analyst would likely have no knowledge.

Accurate and valid results depend upon the knowledge of the analyst to perform the protocol correctly, the integrity of the analyst to not improperly modify the results in one way or another, and the prior calibration with ethanol standards of known concentration being completed properly. The critical steps upon which the ultimate accuracy relies occur early in the preparation of the sample for analysis. Mistakes made by the analyst are not necessarily discernable to anyone else. Achieving results as close as possible to the true amount requires precision and

uniformity throughout the testing procedure. Questioning the actual analyst about the way he or she conducted the test or typically conducts a test is necessary to determine whether the results are accurate and reliable.

II. A PROPER CROSS-EXAMINATION WOULD INCLUDE QUESTIONS THAT ONLY THE ACTUAL ANALYST COULD ANSWER.

In *amici*'s experience, there are numerous areas of cross-examination the defense could pursue with the actual analyst in a case involving blood alcohol concentration, questions the substitute analyst would not be able to answer. The answers to these questions would assist the fact-finder in determining the reliability of the evidence and the credibility of the witness. And although the New Mexico court's decision was premised on the assumption that analysts would virtually never remember doing a workaday test like the one in *Bullcoming*, in *amici*'s experience, in many cases, analysts do remember particular tests, particularly if something unusual – such as a machine malfunctioning during testing – occurred. Moreover, even if an analyst does not remember a specific test, cross-examination questions about *the analyst's* training and methodology – as opposed to a substitute analyst regurgitating textbook laboratory protocols – may reveal significant flaws in the testing.

For example, questions about the analyst's training record may reveal improper training by a

predecessor or training to operate a machine different than the one used to test the blood at issue. Questions about an analyst's employment history might uncover a history of botched test results. Questions about how the analyst generally performs the testing might show that the analyst does not follow laboratory's protocols. The defense may want to know what time of day the analyst tested the sample, whether the analyst left the room while the sample ran through the machine, or whether the particular machine used had malfunctioned recently.

Defense counsel could ask only the analyst specific questions about the actual testing of a defendant's blood, including, but not limited to the following:

- What qualifications does the analyst have? What is the analyst's educational background? Has the analyst ever been disciplined or fired? Has the analyst been properly trained? Has the analyst participated in proficiency testing? When? What were the results?

- Prior to beginning the sampling process, what was the condition of the specimen? Was there any leakage? What was the specimen volume, and is that volume typical for the tube submitted? Was there any clotting in the sample? Were there any signs of fermentation? Are you familiar with how these factors might affect the accuracy of the test?

- How did the analyst document these or other conditions and when in the analyst's judgment do they become significant enough to document?
- Where is such documentation recorded, and where is it kept?
- When the specimen was mixed, how was it mixed? Was the sample rocked on a mechanical rocker, inverted by hand, or shaken? Did the process used introduce bubbles into the specimen, aerating the sample and creating volume differences in sampling?
- What method of GC was used, indirect or direct injection?
- When the specimen was pipetted into the GC vial, how was that accomplished? Did the analyst use recycled pipette tips? If so, did he or she clean them between uses? How did the analyst ensure that he or she is pipetting consistent amounts of liquid into the vials? How does the analyst determine that the correct amount of internal standard is pipetted into the vials?
- What did the analyst do to assure that the correct sequence of specimen identification was entered into the run table of the computer that matches the GC output to the sample identification? How would the analyst know if he or she had made a mistake in entering this

information? How is the information entered, manually, by bar code, or some other method?

- Did the analyst use a salt solution during the test? If so, why? How much?
- Did the analyst use the standard parameters used by the computer program? If so, does this ever result in problematic peaks on the chromatogram? Did the analyst manually enter the parameters? If so, why? Does the analyst ever change the parameters? Why or why not?
- Did the analyst observe any anomalies in the test results? What does the analyst typically do when he or she notices anomalies? Were any changes made in the computer or instrument program? Were all of the peaks symmetrical and separate? What does the analyst do when the peaks are not symmetrical and separate? Was the baseline consistent throughout the results? If not, what did the analyst do? Did the analyst alter the results to make them appear normal? Did the computer make any corrections on this test result? If so, what were they? How could these affect the results of the test?

Guaranteeing criminal defendants the right to cross-examine forensic analysts would not mean that the right would be exercised in every case in

which the prosecution seeks to introduce forensic evidence. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). In many cases, criminal defendants do not go to trial or do not challenge the forensic evidence introduced by the prosecution. But cross-examination of forensic analysts is, in many cases, an essential tool to assist the fact-finder in assessing the reliability of evidence.

III. RECENT CASES CONFIRM THE POTENTIAL FOR ERROR IN FORENSIC LABORATORY REPORTS.

Under the New Mexico Supreme Court's rationale, one analyst is as good as another for purposes of protecting the defendant's right to confrontation. However, "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The Confrontation Clause requires that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). As this Court recognized in *Green v. California*, 399 U.S. 149, 158 (1970), cross-examination is "the greatest legal engine ever invented for the discovery of truth." However, a surrogate witness cannot be meaningfully cross-examined.

Cross-examining a surrogate witness is like cross-examining a textbook – an attorney can only discover what *should* have happened rather than what *actually* happened. This does not assist the fact-finder or the search for the truth. If the actual analyst who performed the blood alcohol analysis strayed from the accepted procedure for conducting the test, or routinely disregards certain protocols, the defendant cannot discover this from cross-examining the surrogate. Moreover, if anything strange happens during a defendant's test, such as a power outage, or machine failure, a surrogate cannot know about it. The general procedure of the test and systemic problems with the type of test can be explored, but the specific problems related to the actual test performed, the actual machine used, and the actual analyst who conducted the test are left unknown.

The New Mexico court's holding would also encourage crime labs to hire professional witnesses. If any expert familiar with the general procedures of the forensic test can testify rather than the analyst who actually performed the test, then laboratories could hire one or more professional witnesses who never perform analyses, but instead appear in court to testify. These professional witnesses could have excellent credentials, while the actual analysts' background and training would remain a mystery. The professional witness could have an excellent courtroom demeanor and appear knowledgeable and authoritative. This presents a dangerous situation for the defendant. Not only would the defendant be

unable to discover any information about the actual test that produced damning evidence in his case, but he would also have a person who appears to have great authority presenting that evidence to the judge or jury. This professional expert would be completely immune to cross-examination as to the actual test performed, but would present a rendition of testing procedure that would sound scientifically credible. In *amici*'s experience, this is precisely what some forensic crime labs do: use only a supervisor to testify, who is insulated from effective cross-examination. This nightmarish scenario turns the Confrontation Clause on its head because it allows the prosecution to present an idealized version of the forensic test with no way to discover what actually occurred through cross-examination.

Additionally, allowing a surrogate analyst to testify insulates the actual analyst from ever being put through the "crucible of cross-examination." *Melendez-Diaz*, 129 S. Ct. at 2536. The analyst who is either conducting fraud, cutting corners or, more likely, who is improperly or incompletely trained has no fear of public exposure. Requiring the actual analyst to testify at trial provides incentive that the tests are performed correctly. Not only does "the prospect of confrontation . . . deter fraudulent analysis," *id.* at 2537, but it also deters careless analysis. The analyst will know that he or she will have to defend the analysis in court, and this will, in turn, lead to more accurate results.

As this Court recognized in *Melendez-Diaz*, confrontation is the best instrument to uncover ignorance, incompetence, mistake, or even fraud in the context of forensic science. 129 S. Ct. at 2536. Despite the aura of reliability that science lends them, forensic laboratory reports are as prone to error and fraud as the *ex parte* affidavits the Confrontation Clause was designed to prohibit. "Forensic evidence is not uniquely immune from the risk of manipulation." *Melendez-Diaz*, 129 S. Ct. at 2536. The recent report by the National Research Council of the National Academies, *Strengthening Forensic Sciences in the United States: a Path Forward* (2009) (NAS Report), confirmed what defense lawyers have long known: because forensic analysis is a product of human discretion, it is vulnerable to incompetence, error and sometimes even fraud. *See also* Solomon Moore, *Science Found Wanting in Nation's Crime Labs*, N.Y. Times, Feb. 5, 2009, *available at* http://www.nytimes.com/2009/02/05/us/05forensics.html (last visited Dec. 1, 2010). As the NAS Report revealed, forensic analyses "are often handled by poorly trained technicians who then exaggerate the accuracy of their methods in court." *Id.* The NAS Report verifies that forensic science is anything but infallible, and is instead fraught by very human errors leading to problems such as sample contamination and inaccurate reports. *Id.*

Cross-examination is the best mechanism to "weed out not only the fraudulent analyst, but the

incompetent one as well." *Melendez-Diaz*, 129 S. Ct. at 2537. In many cases, cross-examining the actual analyst who produced the inculpatory evidence as to acts or omissions is the *only* way to reveal the problems in testing in a given case because of problems with internal controls in laboratory and the lack of other forms of oversight. Solomon Moore, *Science Found Wanting in Nation's Crime Labs*, N.Y. Times, Feb. 5, 2009. Moreover, if the Court were to adopt the New Mexico court's reasoning, it would not be limited to simply BAC tests, but other types of forensic testing, including DNA analysis, drug testing, etc. Forensic evidence is particularly damning evidence and is increasingly ubiquitous in criminal trials. Many jurors – perhaps the majority of jurors – now expect to hear about scientific evidence, placing an increasing pressure on prosecutors to rely heavily on such evidence. Hon. Donald E. Shelton, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 Vand. J. Ent. & Tech. Law 331, 363 (2006). But if the Court accepts the New Mexico court's test, the prosecution will be permitted to introduce highly prejudicial and inaccurate forensic evidence without any meaningful challenge from defense counsel. The harm created by such a system is obvious. In an increasing number of cases, the fact-finder's decision of guilt or innocence hinges on forensic evidence. Imagine, for example, a common scenario in DUI cases: the blood analysis report states that the defendant's BAC was .08 (the level at which a defendant is presumptively impaired under

many DUI statutes), but the defendant vigorously disputes that he had any alcohol the entire night. One reasonable explanation for the inconsistency is that the laboratory analyzing the defendant's blood either intentionally or negligently reported false results. That information could only be revealed through cross-examination of the actual analyst who conducted the testing, but if the defense is deprived of the opportunity to cross-examine the actual analyst, it is likely the defendant would be convicted. Cross-examination is one of the few proven and effective ways to prevent a wrongful conviction based on a forensic analyst's faulty methodology.

Amici's fear of inaccurate forensic test results being admitted at trial is grounded in reality. A few recent incidents in DUI cases around the country show that blood analysis identical to the type used in *Bullcoming* is vulnerable to error or even fraud. For example, a recent investigation conducted by the Colorado Springs Police Department's Metro Crime Lab discovered 206 false high blood alcohol tests in 2007 and 2009 alone, all attributable to a single chemist. John Ensslin, *Final tally on flawed DUI: 206 errors, 9 tossed or reduced*, Colo. Springs Gazette, Apr. 19, 2010, *available at* www.gazette.com/articles/report-97354-police-discuss.html (last visited on Nov. 26, 2010). Nine DUI convictions were dismissed as a result, but it is impossible to know how many individuals were erroneously convicted. *Id.* The investigation revealed that a particular chemist had inserted low levels of n-propanol into many of her

blood samples, resulting in a correspondingly higher calculation for the ethanol levels in the samples. Anthony Lane, *Unsolved Mysteries in the CSPD's Crime Lab*, Colo. Springs Indep., Apr. 19, 2010, *available at* http://www.csindy.com/colorado/unsolvedmysteries/content?oid=1699431 (last visited on Nov. 27, 2010). Yet "going back to 2002, supervisors consistently rated [the chemist] as 'effective' or 'excellent,' with no hint of problems." *Id.* The improper addition of the internal standard could have been discovered through cross-examination.

Other instances of ethanol testing errors have been reported in the press. For example, in Tooele County, Utah, a driver who had consumed no alcohol was reported to have a 0.19 blood alcohol level. Retesting produced 0.00 results. Subsequent review showed that the analyst had improperly transposed numbers, resulting in the erroneous reading. Nicole Gonzales & Marc Giauque, *Homicide Charge Dropped Following Blood Test Mistake*, Jan. 28, 2009, *available at* http://www.ksl.com/?nid=148&sid=5442828 (last visited on Nov. 24, 2010).

In Washington State, the supervisor of the State Police toxicology laboratory was found to have falsified certifications that she had tested solutions used to calibrate and test breath alcohol machines. Other individuals in the laboratory covered up the fraud. *City of Seattle v. Holifield*, No. 83277-3, 2010 WL 4008889 (Wash. Oct. 14, 2010); *see also* Tracy Johnson & Daniel Lathrop, *Allegations May Cast Cloud Over DUI Cases: State lab manager quits after she is*

accused of signing false statements, Jul. 31, 2007, *available at* http://www.seattlepi.com/local/325706_dui31.html (last visited on Nov. 25, 2010). *See also* Jaxon Van Derbeken, *Lab Employee to Take the 5th in DUI Trial*, S.F. Chron., Apr. 7, 2010 at C1; Mark Alesia and Tim Evans, *Toxicology gaffes likely to affect cases*, Dec. 6, 2010, *available at* http://wap.indystar.com/detail.jsp?key=774876&rc=th&full=1 (last visited on Dec. 6, 2010).

Those real-world examples demonstrate the danger of inaccurate test results being introduced at trial, as well as the importance of being able to cross-examine the actual analyst who did the work in a case. In *Bullcoming*, there is at least a reasonable inference there may have been an issue with the competence or even truthfulness of the actual analyst who tested the defendant's blood: the analyst was on unpaid administrative leave, and was thus unavailable to testify. JA 6. Was the analyst on unpaid administrative leave because he failed to follow lab protocols in this case or had a history of creating fraudulent reports? The truth may never be revealed because the analyst was not subjected to the crucible of cross-examination. This is anathema to the underpinnings of the Confrontation Clause. *Amici*'s experience shows that substitute analysts may be simply unaware of incompetence, negligence, or fraud committed by the actual analyst who performed the testing. In many cases, only a careful and skillful cross-examination of the actual analyst who conducted the flawed test or tests will reveal the truth.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's Brief, the judgment below should be reversed.

Respectfully submitted,

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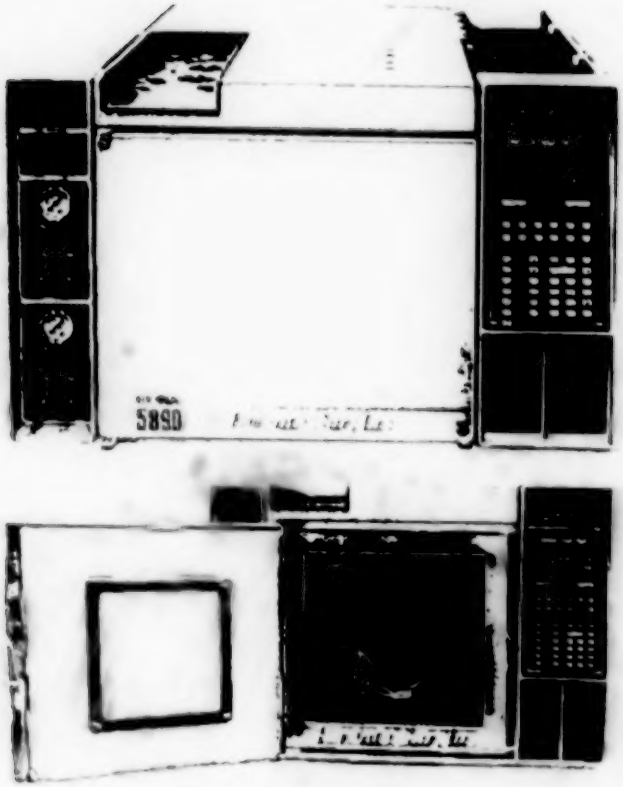
APPENDIX A

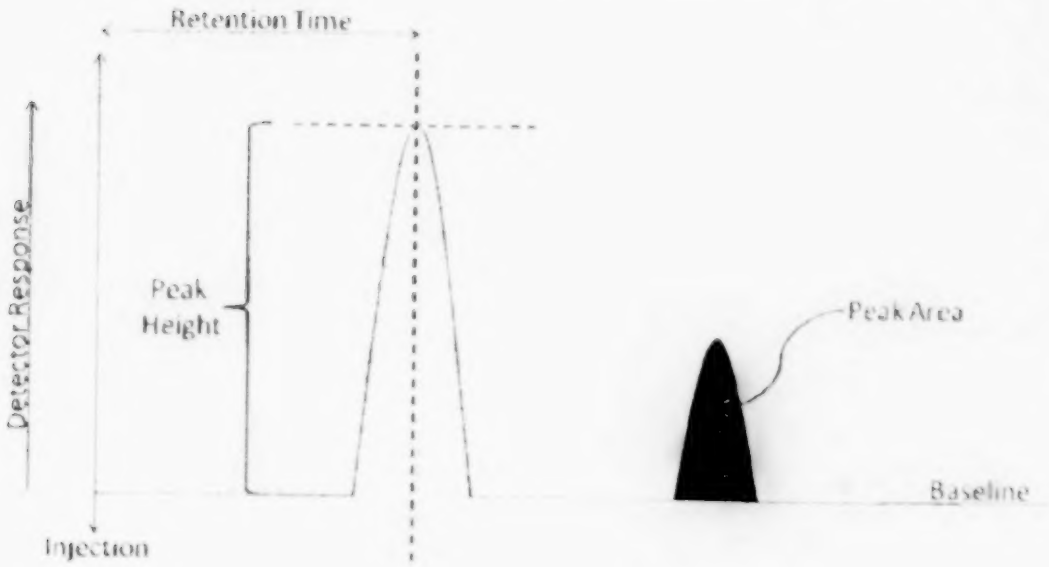


GC MACHINE

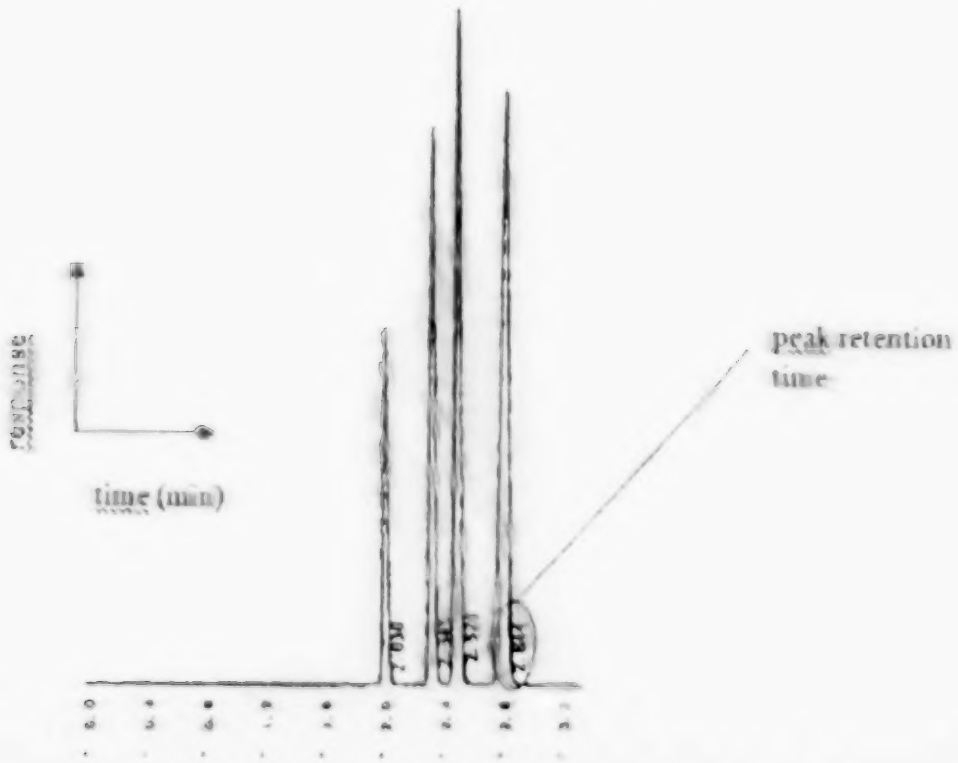
LOADED AUTOSAMPLER

APPENDIX B

TYPICAL CHROMATOGRAM

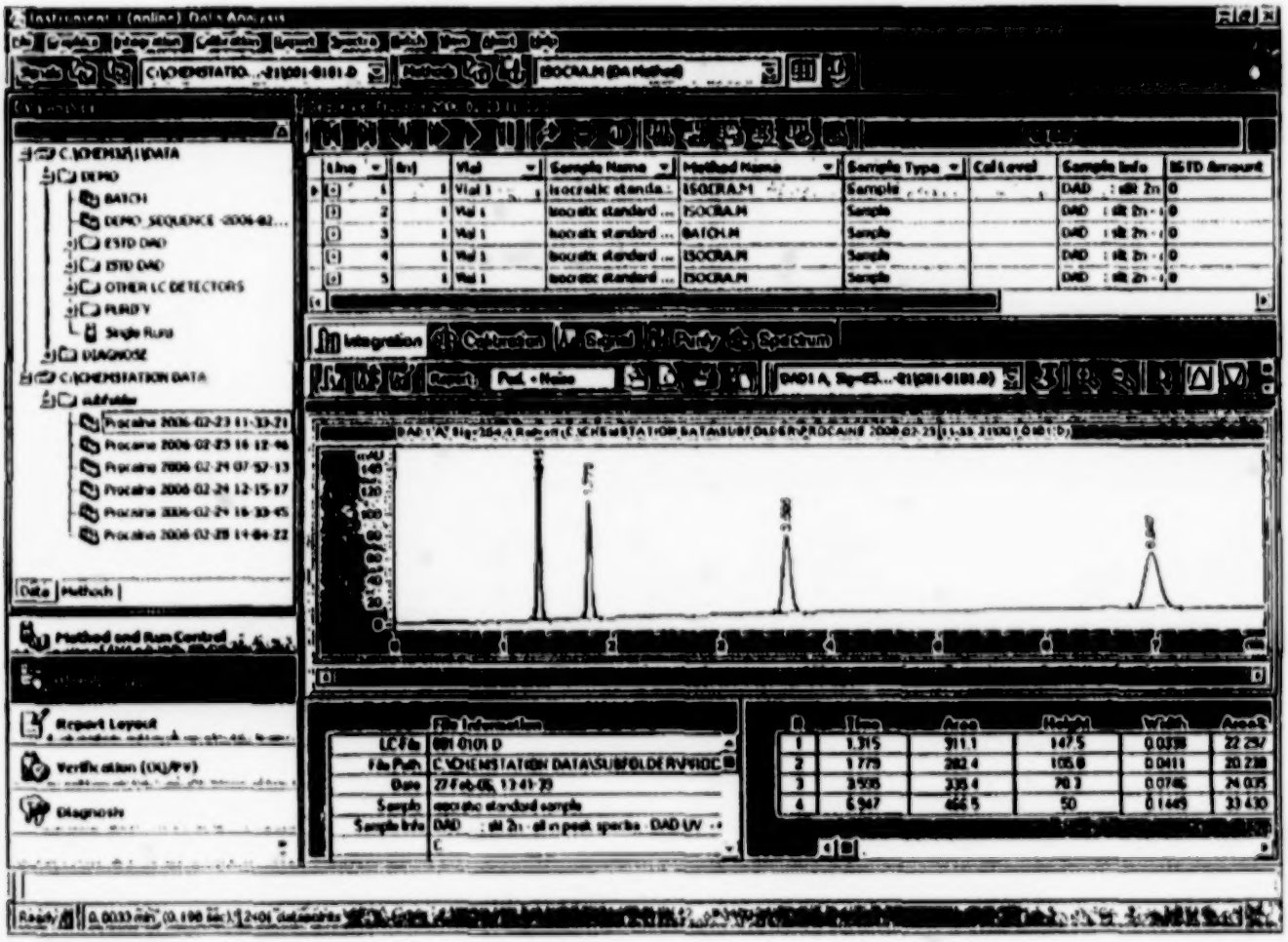


EXAMPLES OF REAL CHROMATOGRAM

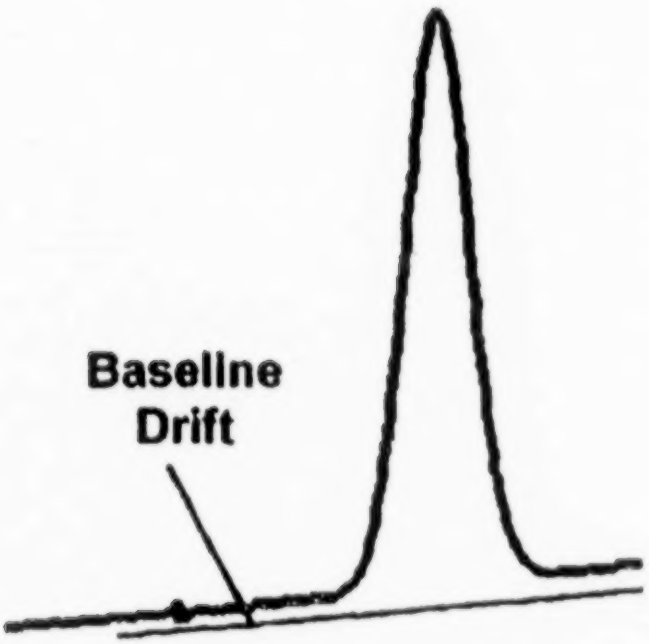


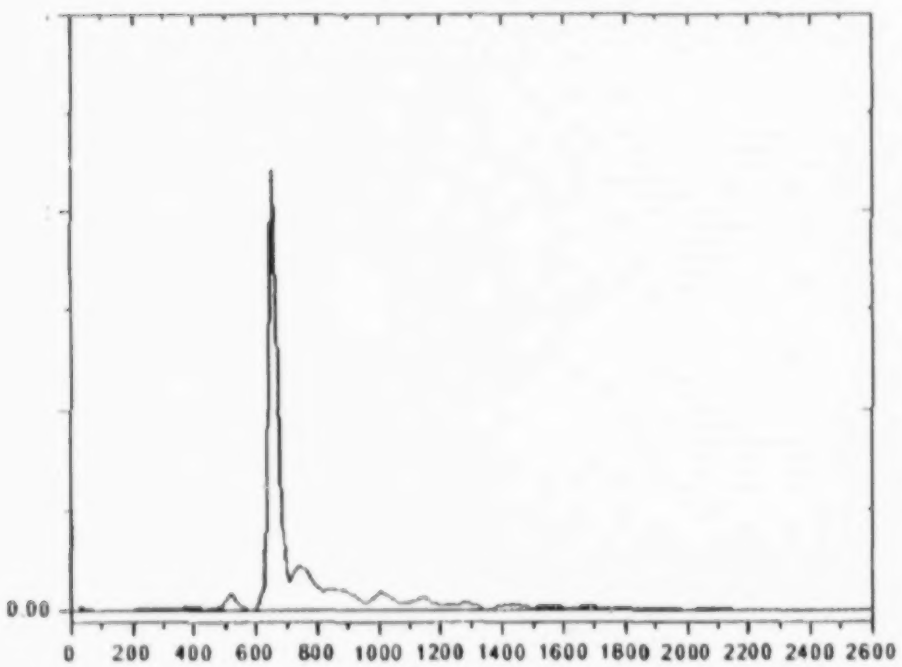
APPENDIX C

EXAMPLES OF COMPUTER SCREEN VIEWED BY ANALYST



APPENDIX D





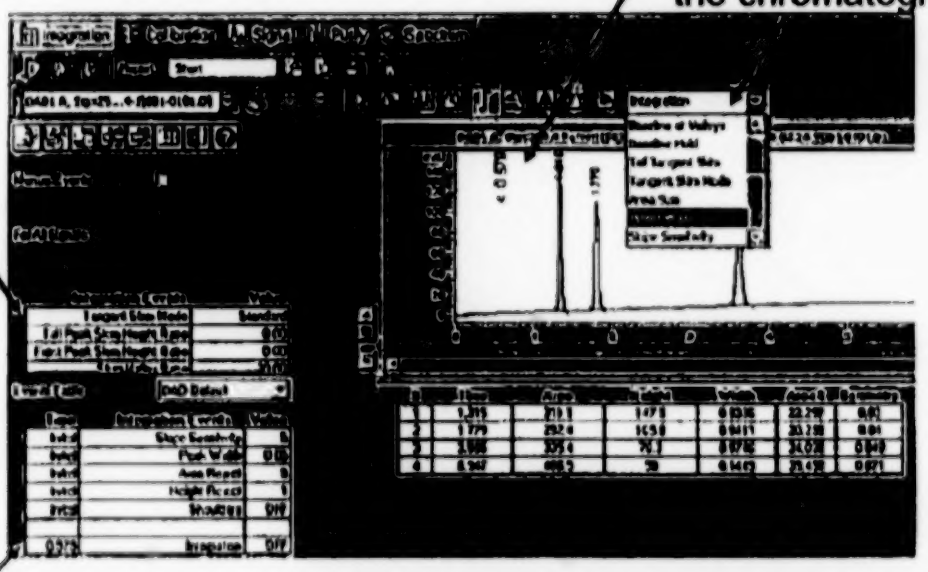
EXAMPLE - BASELINE DRIFT

APPENDIX E

Integrator UI

Define integration parameters just by selecting and clicking on the chromatogram

Integration events for all signals

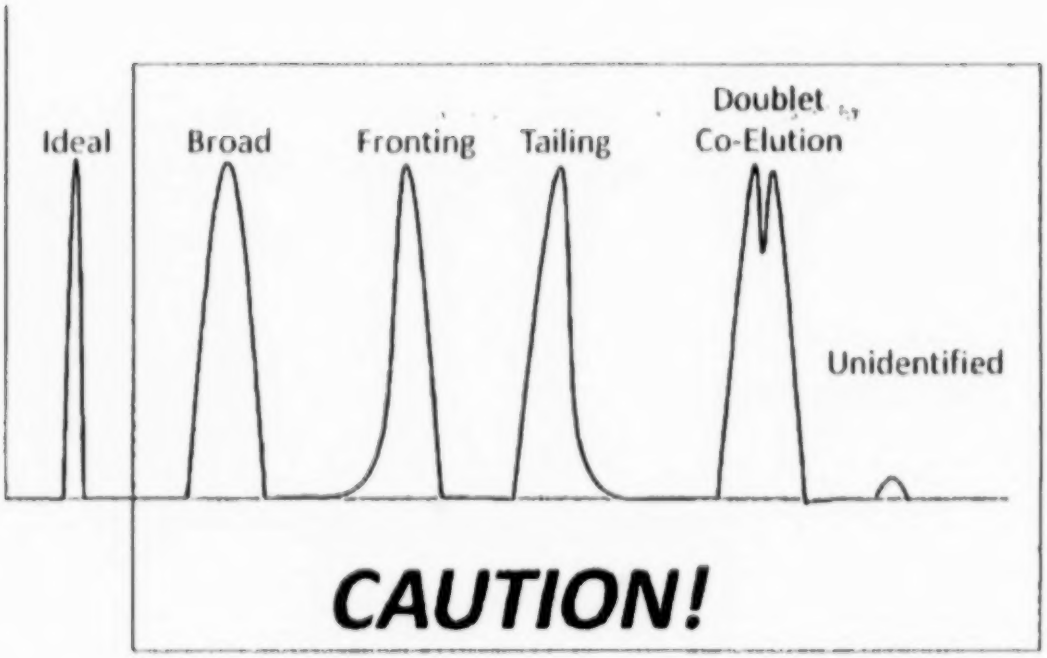


There are two sets of detector specific integration events:

initial events and *time-based*

EXAMPLE OF HOW ANALYST CAN MANIPULATE THE CHROMATOGRAM

Peak Shapes



PEAK SHAPES THAT AFFECT THE VALIDITY OF THE TEST

AMICUS CURIAE BRIEF

No. 09-10876

In The Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Writ Of Certiorari To The New Mexico Supreme Court

BRIEF OF AMICI CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, AMERICAN SOCIETY OF CRIME LAB DIRECTORS, CALIFORNIA ASSOCIATION OF CRIME LABORATORY DIRECTORS, INTERNATIONAL ASSOCIATION OF CORONERS AND MEDICAL EXAMINERS, NATIONAL ASSOCIATION OF MEDICAL EXAMINERS, CALIFORNIA STATE CORONERS ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
FACTS AND PROCEDURAL BACKGROUND	5
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. *MELENDEZ-DIAZ v. MASSACHUSETTS* DOES NOT PROHIBIT OPINION TESTIMONY OF AN EXPERT ANALYST THAT IS BASED ON THE WORK OF ANOTHER ANALYST	8
II. THE RATIONALE OF *MELENDEZ-DIAZ*, THAT FORMALIZED TESTIMONIAL MATERIAL REQUIRES CONFRONTATION, DOES NOT COMPEL EXCLUSION OF THE TESTIMONY OF ANALYST RAZATOS	14
III. ANECDOTAL EVIDENCE OF ERRORS IN INDIVIDUAL LABORATORIES DO NOT PROVIDE JUSTIFICATION FOR EXTENDING *MELENDEZ-DIAZ* BEYOND ITS HOLDING	17
IV. TESTIMONY OF A SUPERVISING ANALYST PROVIDES A CRIMINAL DEFENDANT CONSTITUTIONALLY MEANINGFUL AND SUFFICIENT OPPORTUNITY TO CONFRONT WITNESSES AND TEST THE RELIABILITY OF MODERN TOXICOLOGY OPINION EVIDENCE	20
CONCLUSION	33

TABLE OF CONTENTS – Continued

Page

APPENDIX

Photo of Gas Chromatograph.....App. 1

TABLE OF AUTHORITIES

Page

CASES

Crawford v. Washington, 541 U.S. 36 (2004).....*passim*

Davis v. Washington, 547 U.S. 813 (2006).....16

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United States v. Washington, 498 F.3d 225 (4th Cir. 2007).....21

United States v. Williams, 447 F.2d 1285 (5th Cir. 1971).....10, 13

STATUTES

California Evidence Code section 801 .....10, 12

California Evidence Code section 802 12

CONSTITUTIONAL PROVISION

U.S. Constitution, Sixth Amendment.....11, 16, 17

RULES

Federal Rule of Evidence 105.....12

Federal Rule of Evidence 702.....11

Federal Rule of Evidence 703.....10, 11, 12

Federal Rule of Evidence 705.....11

TABLE OF AUTHORITIES – Continued

Page

Federal Rule of Evidence 801 22

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF AMICI CURIAE

This brief is submitted by the National District Attorneys Association, the California District Attorneys Association, the American Society of Crime Lab Directors, the California Association of Crime Laboratory Directors, International Association of Coroners and Medical Examiners, National Association of Medical Examiners, California State Coroners Association as amici curiae in support of respondent the State of New Mexico.[1]

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows and addresses public policy issues involving criminal justice and law enforcement.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amici, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, amici state that counsel of record for all parties have consented to the filing of this brief in letters on file with the Clerk's office.

The California District Attorneys Association (CDAA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. CDAA presents prosecutors' views in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice statewide.

The American Society of Crime Lab Directors (ASCLD) is a non-profit professional society that was formed in 1974. The Society has over 600 members, composed of crime laboratory directors, managers and supervisors from the United States, Canada, Puerto Rico, Virgin Islands, China, Costa Rica, Finland, Hong Kong, Ireland, Italy, England, Israel, Sweden, Switzerland, New Zealand, Singapore, Taiwan, Turkey and Australia. The membership consists of biologists, chemists, document examiners, physicists, toxicologists, educators, instructors, and law enforcement officers whose major function is the management of a crime laboratory. The purposes of ASCLD include assisting the development of laboratory management, acquiring, preserving, and disseminating forensic based information, and promoting, encouraging, and maintaining the highest standards of practice in the field.

The California Association of Crime Laboratory Directors (CACLD) has existed for over 40 years, and is a non-profit corporation. Its 140 members are managers, directors, and supervisors of both public and private sector forensic science laboratories, including two federal laboratories administered by the Drug Enforcement Administration and the Bureau of Alcohol, Tobacco and Firearms, thirteen laboratories operated by the California State Department of Justice, Bureau of Forensic Services, and nineteen public laboratories administered by city and county agencies. All but one of these crime laboratories are accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), the largest forensic science accrediting body in the world. CACLD includes among its purposes improvement of management in forensic science laboratories, the effective exchange of forensic science information, assisting in the preparation of regulatory matters affecting forensic science laboratories, and promoting, encouraging and maintaining the highest professional and ethical standards in the field of forensic science laboratory services.

The International Association of Coroners and Medical Examiners (IACME) was founded in 1927, and includes members from the United States, Mexico, Canada, Georgia, the Philippines, Belgium, Saudi Arabia, Morocco, the Netherlands, and Australia. IACME conducts an accreditation program, and has over 70 years experience in the presentation of

educational seminars to assist coroners and medical examiners in performing their duties. This commitment is enshrined in the Association's Mission Statement which reads as follows: "The International Association of Coroners and Medical Examiners is committed to advancing the accurate determination of the cause and the manner of death through the utilization of science, medicine and the law."

The National Association of Medical Examiners (NAME) is the national professional organization of physician medical examiners, medical death investigators and death investigation system administrators who perform the official duties of the medicolegal investigation of deaths. It was founded in 1966 and has over 1,000 members in the United States and internationally. Membership is open to all physicians, investigators, and administrators who are active in medicolegal death investigation. NAME's purposes include fostering the professional growth of physician death investigators, disseminating professional and technical information vital to the continuing improvement of the medical investigation of violent, suspicious and unusual deaths, promoting excellence in medicolegal death investigation, and the highest practice of ethical conduct.

The California State Coroners Association (CSCA) is a non-profit organization founded in 1968 to promote and protect the interests of all Coroner and Medical Examiner professionals throughout California. Coroners, Sheriff-Coroners, and Medical Examiners have the mandated mission to determine

the circumstances, manner, and cause of all violent, sudden or unusual deaths. The Association promotes professionalism and expertise in the field of medicolegal death investigation. CSCA is committed to communicating its members' concerns to government and regulatory bodies, advocating for sound public policies that affect coroners and medical examiners, promoting professional standards that enhance the effectiveness of the medicolegal death investigation service to our communities, and providing excellence in training and education.

This case raises matters of concern to prosecutors and forensic laboratory professionals. The decision by the Court in this case will affect how crime labs examine and process evidence, and provide testimony in court as to lab results. It will also affect how prosecutors prepare for and prove cases involving forensic evidence; it may affect what evidence can in fact be proved in court, and even what cases may be barred from prosecution, depending on rules of constitutional dimension that this Court may announce.

Amici have expertise in the matters pending before the Court in this case, and believe that their brief will be helpful in this Court's decision on these matters.

FACTS AND PROCEDURAL BACKGROUND

Following a vehicle collision in Farmington, New Mexico (petitioner rear-ended a vehicle that was

stopped at an intersection), police arrested petitioner, who refused to take a breath test. After obtaining a warrant, a blood sample was drawn from petitioner.

The blood was drawn by a nurse into two vials, observed by an officer, who accepted the vials, and sealed the blood sample in a package called a blood draw kit, which included a Form 705, with chain of custody information. The blood draw kit was sent to the Toxicology Bureau of the New Mexico Department of Health, where it ultimately came into the Scientific Laboratory Division (SLD), and the custody of a person who was designated as the analyst. The analyst made certain entries onto the Form 705, and then placed some of the blood into a gas chromatograph, an instrument or machine used in analytical chemistry for separating and analyzing compounds. The instrument, through an automated process, performed the steps necessary to make an analysis of the compounds in the blood, using mechanical detectors, and produced a data reading stating whether alcohol was identified, and if so, in what amount. Once the blood was placed into the gas chromatograph, the instrument did all of the analytical work, produced the data, and then a computer which was part of the gas chromatograph assembly printed out the results. The gas chromatograph reported that petitioner's blood contained .21 grams of alcohol per 100 mLs of blood (i.e., .21%), more than two and one-half times the legal limit of .08 grams/100 mLs (.08%). The person designated as the analyst reviewed the data as provided by the instrument and entered the result onto

the Form 705. His work received two reviews before the Form 705 was returned to the police department.

At trial, the person at SLD who was designated as the analyst did not testify. Supervising analyst Gerasimos Razatos did testify. Razatos was not involved in the initial handling of the blood sample, nor in the earlier reviews of the original analyst's work. He did review both the analyst's work and the gas chromatograph analysis prior to testifying. He explained in his testimony the lab procedures, and how the records showed that they were followed in this case. The trial court admitted the Form 705 into evidence, following Razatos' testimony.

Petitioner was convicted of aggravated driving under the influence. His case was affirmed by the New Mexico Court of Appeal, and the New Mexico Supreme Court. This Court issued a writ of certiorari to consider the application of the Confrontation Clause to these facts, in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S.Ct. 2527 (2009).

SUMMARY OF ARGUMENT

Melendez-Diaz addressed a situation where the prosecution presented no live witness at all to testify as to the forensic expert opinion. Neither the holding of *Melendez-Diaz*, nor its underlying rationale, provide any basis for the conclusion that a qualified expert who has reviewed the work, records and material produced by an original expert, and testifies

based thereon to expert forensic matters, offends the Confrontation Clause. Anecdotal evidence of isolated problems in individual forensic laboratories around the country do not support the conclusion that testimony of the original forensic expert at trial is necessary under the Constitution. The testimony of an expert other than the original analyst, when the second expert is qualified, familiar with the applicable science, laboratory procedures, and any equipment that may be involved, provides constitutionally meaningful and adequate confrontation, particularly in light of the realities of modern forensic science practice.

ARGUMENT

I. *MELENDEZ-DIAZ v. MASSACHUSETTS* DOES NOT PROHIBIT TESTIMONY OF AN EXPERT ANALYST THAT IS BASED ON THE WORK OF ANOTHER ANALYST

Petitioner asserts error based on a claimed violation of the Confrontation Clause under *Crawford v. Washington,* 541 U.S. 36 (2004), and the more recent case of *Melendez-Diaz v. Massachusetts,* 557 U.S. ___, 129 S.Ct. 2527 (2009). The New Mexico Supreme Court concluded that the rule of *Melendez-Diaz* does not extend to the situation presented by this case. The New Mexico Supreme Court correctly decided this issue.

In *Melendez-Diaz*, police had found four plastic bags containing a white substance in defendant's car. After he was arrested and transported to the police station in the back seat of a police car, officers found 19 more bags with a white substance in the back seat. At trial on drug charges, following a procedure then available in Massachusetts, the prosecution presented three "certificates of analysis" attesting to the crime lab results (cocaine), without the testimony of any witness. (See 557 U.S. at ___, 129 S.Ct. at 2530-2531.) Applying the rule of *Crawford v. Washington*, this Court ruled 5-4 that such a procedure denies the defendant the right to confrontation of witnesses under the Sixth Amendment.

The situation in the case at bar is not the situation addressed in *Melendez-Diaz*. Here, the report prepared by the SLD analyst who was designated as the analyst for this case was admitted into evidence, with and through the testimony of analyst Razatos, who was himself a qualified analyst, and a supervisor at the laboratory. Razatos, a live, qualified expert witness, could authenticate and explain the report, the lab procedures, and the analytical conclusions in his testimony.

The *Melendez-Diaz* majority at no point held that an expert opinion could not be introduced through live testimony of an expert who based his/her opinion on non-admissible matter, including hearsay, so long as it is reasonably relied on by experts in the particular field. This, of course, is the modern rule for the underlying basis for expert testimony in the vast

majority of jurisdictions in this country. It is the rule in the Federal Rules of Evidence (FRE). Federal Rule of Evidence 703. New Mexico has adopted the federal rules, as have 41 other states, Puerto Rico, Guam and the military. *Weinstein's Federal Evidence*, 2d ed., vol. 6, pp. T-1 through T-9.[2] Jurisdictions which have not adopted the federal rules generally have a counterpart to Rule 703 which reaches the same result. See, e.g., *People v. Angelo*, 88 N.Y.2d 217, 222, 644 N.Y.S.2d 460 (1966), and *People v. Radesi*, 11 A.D.3d 1007, 1008, 782 N.Y.S.2d 341 (2005); California Evidence Code section 801(b).

Melendez-Diaz at no point suggested its holding was in any way intended to undercut this longstanding and widespread rule. As the Fifth Circuit explained in *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971), " . . . when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." To the extent petitioner would have this Court exclude the testimony of lab supervisor Razatos, it would abrogate this longstanding rule when neither the text of nor the

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[2] Eight states have not adopted the federal rules: California, Georgia, Illinois, Kansas, Massachusetts, Missouri, New York and Virginia. *Weinstein's Federal Evidence*, supra, vol. 6, pp. T-1 through T-9.

reasoning behind *Melendez-Diaz* provide any reason to do so.

There is good reason why the ruling in *Melendez-Diaz* does not serve as a basis for rejecting the admissibility of expert testimony that is based on reliable hearsay of the type normally considered by experts in the field. *Melendez-Diaz* is based on the rule of *Crawford* as to the meaning of the Sixth Amendment right of confrontation. But *Crawford* only applies to hearsay admitted for the truth of the matter. It does not apply to statements that are not admitted for the truth of the matter. *Crawford*, supra, 541 U.S. at 59, fn. 9. Hearsay material relied on by an expert, when it is admitted at all during the testimony of the expert, is *not* admitted for the truth of the matter. See New Mexico Rule of Evidence[3] 11-703, and comment to 2006 revision; Federal Rule of Evidence 703, and comment to 2000 revision.

Supporting this argument is the fact that the evidentiary rules concerning hearsay used as the basis for expert opinion are not codified as hearsay exceptions, nor are they structurally in the part of the evidence rules dealing with hearsay. Rules 702, 703 and 705, dealing with the basis of expert testimony, are in Article VII of both the New Mexico and federal rules, entitled "Opinions and Expert Testimony." The evidence rules defining hearsay and hearsay exceptions are in Article VIII. Jurisdictions not using the

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[3] Hereafter NMRE.

federal rules approach the issue in a similar way. California, for instance, deals with material that is the basis for expert opinion in California Evidence Code sections 801 and 802, which are in Division 7 of the California Evidence Code (entitled "Opinion Testimony and Scientific Evidence"), not in Division 10 of that code, dealing with hearsay.

One should also note that an expert who has relied on hearsay matter will not always, or even usually, be allowed testify over objection on direct examination as to the details of the underlying hearsay. NMRE 11-703, and comment to 2006 revision; FRE 703, comment to 2000 revision.

When reference to the underlying details of the hearsay material is for some reason necessary for the jury to fully understand the opinion of the testifying expert, a limiting instruction may be appropriate. Id.; NMRE 11-105, FRE 105. Enforcement of these rules can protect the rights of a criminal defendant while still permitting the admission of the expert opinion.

Nor should it be of great import for analysis of the issue here that the Form 705 itself was admitted into evidence. Had the original analyst been present and testified in court, there would be little objection to the admission of the Form 705. Supervisor Razatos served the same foundational purpose in the trial court that the original analyst would have served. To the extent one might question whether or not Razatos' testimony amounted to a statement of his own opinion based on his knowledge of the laboratory

procedures and the material he reviewed, only one more question on direct examination would make that point.[4] There is little reason to doubt what the answer would be, and even less reason to base a constitutional rule on the fact that one question, the answer to which can be readily inferred, was not expressly asked here. If this Court concludes the failure to expressly ask that one question is indeed a constitutional failure here, saying so directly will clarify for future cases that the prosecution should ask that question, and make that point. For, as *United States v. Williams*, supra, and the Rules of Evidence make clear, the expert's opinion is evidence in its own right, even when based on hearsay.

Based on the foregoing, there is no reason to conclude that *Melendez-Diaz* prohibits the admissibility of the testimony of a qualified expert such as Razatos, when that testimony is based on the reliable work of an underlying expert.

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[4] The question: "Based on the material you have reviewed, what is your opinion as to Mr. Bullcoming's blood alcohol level at the time the blood sample was drawn?"

II. THE RATIONALE OF *MELENDEZ-DIAZ*, THAT FORMALIZED TESTIMONIAL MATERIAL REQUIRES CONFRONTATION, DOES NOT COMPEL EXCLUSION OF THE TESTIMONY OF ANALYST RAZATOS

Analysis of the principles underpinning the confrontation basis for *Melendez-Diaz*, as it applies to this case, reveals that the underlying principles do not compel the exclusion of the testimony of analyst Razatos here.

In the majority opinion in *Melendez-Diaz*, at footnote 1, Justice Scalia discussed the issue of just who must testify in support of a laboratory analysis, and whether any particular person must testify:

> Contrary to the dissent's suggestion, *post*, 557 U.S. ___, 129 S.Ct. at 2544-2545 (opinion of KENNEDY, J.), *we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case.* While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," . . . this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, *ibid.*, from *United States* v. *Lott*, 854 F. 2d 244, 250 (CA7 1988), "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in

> the chain of custody are so crucial as to require evidence; *but what testimony is introduced must (if the defendant objects) be introduced live.* Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.
>
> 557 U.S. at ___, 129 S.Ct. at 2532 (emphasis added).

As the record in this case makes clear, the analysis in the modern forensic laboratory, and the analysis done here, involves work by a number of individuals, but the actual chemical analysis is done by a gas chromatograph instrument. The gas chromatograph, through an automated, mechanical process, takes a sample of the blood, and submits it to testing processes, measures the result, and then generates a computer printout so the data can be read. The "analyst" simply loaded the petitioner's blood into the gas chromatograph. Viewed in this light, it is clear the "analyst" was just one person in the chain of custody, who did not in fact perform the analysis at all. The analysis was performed by the gas chromatograph. A qualified witness such as Razatos, familiar with the chemistry and science behind the process and the gas chromatograph instrument, and the procedures of the lab, could review the analysis, explain the results and how they were produced as well as the original person who was designated as the analyst by virtue of the laboratory protocol (even though the gas chromatograph, and not the "analyst," actually did the analysis). The live

testimony of the nurse who drew the blood sample, the officer who received the blood sample and sealed it in the blood draw kit, and supervisor Razatos, who could explain both how the instrument made the analysis and the results, satisfied the confrontation requirement as it was described in Justice Scalia's majority opinion in *Melendez-Diaz*.

In addition, any consideration of the underlying basis for *Melendez-Diaz* must focus on the concept of whether the materials at issue are "formalized testimonial materials" within the reach of the Sixth Amendment. See *Melendez-Diaz*, concurring opinion of Justice Thomas, 557 U.S. at ___, 129 S.Ct. at 2423. In *Davis v. Washington*, 547 U.S. 813 (2006), Justice Thomas explained that the Confrontation Clause was intended by the framers to prevent the practice employed by the Marian statutes, when witnesses were examined outside the presence of the court, the examinations were transcribed, and the transcripts were then submitted later to the court. 547 U.S. at 835-836. Based on this analysis of the Confrontation Clause, Justice Thomas concluded that the clause was directed only at formalized testimonial materials, such as affidavits, depositions, prior testimony, and confessions. Id., at 836.

While the "certificates of analysis" that were admitted in *Melendez-Diaz* without any live testimony were "quite plainly affidavits," and thus "formalized testimonial materials," (Thomas, J., concurring, 557 U.S. at ___, 129 S.Ct. at 2543), the same cannot be said for the materials at issue here. The underlying laboratory work by one analyst, as part of a chain of

custody putting a blood sample into a gas chromatograph, and then recording the result, which in turn is relied on by a supervising analyst, who then testifies in court, simply is not the type of "formalized testimonial materials" covered by the Sixth Amendment so as to exclude the testimony of the supervising analyst.

In short, neither the analytical foundation of the *Melendez-Diaz* majority opinion, nor that of the concurring opinion of Justice Thomas, supports petitioner's position that the testimony of a supervising analyst does not satisfy the Confrontation Clause.

III. ANECDOTAL EVIDENCE OF ERRORS IN INDIVIDUAL LABORATORIES DO NOT PROVIDE JUSTIFICATION FOR EXTENDING *MELENDEZ-DIAZ* BEYOND ITS HOLDING

The anecdotal horror stories about inaccurate laboratory results cited in this case by amici curiae National Association of Criminal Defense Lawyers (NACDL), et al., in their brief in support of petitioner (pp. 32-34 of that brief) are red herrings with respect to the issue before the Court. A review of the very articles cited in their amicus brief reveals that the inaccurate test results at a local crime lab in Colorado were exposed not through cross-examination at a criminal trial, but rather through regular proficiency testing undertaken by the lab itself, then confirmed and traced to its source through follow-up testing by that lab. The police

agency which administered the lab then voluntarily and publicly disclosed the problem. This incident does not provide support for the notion that defense cross-examination will expose and solve the issue of human mistakes in the lab. Rather, it endorses the approach taken by your amici American Society of Crime Lab Directors and the California Association of Crime Laboratory Directors, which endorse and participate in both the proficiency testing programs and the high ethical standards that, in the Colorado lab, led to the discovery of the problem and its public disclosure.

Similarly, the case cited from the State of Washington, involving failure of a state lab official to properly test control solutions for blood alcohol testing, came to light after an anonymous tip led to a police investigation, the results of which were then publicly disclosed.

One should also note that, again based on the very media reports cited by NACDL, the number of cases affected in those matters is relatively small compared to the overall crime lab toxicology[5] caseload nationwide. The "Census of Publicly Funded Crime Laboratories, 2005," a bulletin published in 2008 by the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, reported (at p. 10 of the bulletin) that nationwide, the number

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[5] Blood alcohol analysis is simply a subset of the larger field of toxicology. See the referenced Bureau of Justice Statistics bulletin, at p. 10.

of toxicology analysis requests for 2005 (the year covered by the survey) was over 250,000. The number of cases potentially affected by the Colorado crime lab problem was estimated in the article to be 206 cases in two years, an average of 103 cases per year, or .04% of the national caseload.

Your amici do not defend negligent, sloppy or deficient lab practices which lead to inaccurate results. ASCLD and CACLD are dedicated to the highest standards of forensic science and ethics, as are NDAA, CDAA, the International Association of Coroners and Medical Examiners, the National Association of Medical Examiners and the California State Coroners Association. But the "real world examples" put forth by amici National Association of Criminal Defense Lawyers in this case are not real world examples of how extended cross-examination of the actual analyst who performed just one step in the process – putting the blood sample in the gas chromatograph – will lead to uncovering the kind of problems that arose in Colorado and Washington. Indeed, in those situations, it appears that the problems in each of those labs easily passed through the "rigors of cross-examination" many times, in many cases, without exposure. It was the work of laboratory and law enforcement officials outside the courtroom which uncovered the problems, and made public disclosure of them. These examples provide no cause to extend *Melendez-Diaz* in the manner proposed by petitioner here.

IV. TESTIMONY OF A SUPERVISING ANALYST PROVIDES A CRIMINAL DEFENDANT CONSTITUTIONALLY MEANINGFUL AND SUFFICIENT OPPORTUNITY TO CONFRONT WITNESSES AND TEST THE RELIABILITY OF MODERN TOXICOLOGY OPINION EVIDENCE

There is another point which reflects on the propriety of admission of the expert testimony of lab supervisor Razatos, or any similarly situated expert. The point has to do with the scope of the express language of *Melendez-Diaz*, and the reality of analytical work as it exists in the modern forensic laboratory and as it is described in the record of this case.

As noted above with reference to the majority opinion of Justice Scalia in *Melendez-Diaz*, at footnote 1, the Confrontation Clause does not necessarily require that any particular person testify in order for laboratory analysis evidence to be admissible. This passage is particularly significant when viewed in light of the record in this case, and what can be seen and understood about the practice in modern toxicology laboratories.

The blood sample drawn from the defendant was handled by several other persons: at a minimum, the nurse who drew the blood; the officer who received it and packaged it in the blood draw kit, then placed it in a box for delivery; whatever person or persons transported it to SLD; and then whatever personnel received it at SLD and delivered it into the hands of the person who came to be designated as the analyst,

who in turn put the blood sample into the gas chromatograph instrument, and then recorded the results which the computer printed out.

This type of situation was properly analyzed by *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007). In that case, as in this one, technicians put the defendant's blood sample into a gas chromatograph. They presented the resulting printouts to the lab's chief toxicologist, Dr. Levine, who issued a report, and testified in court over the defendant's *Crawford* objection that the defendant's blood contained PCP and alcohol. In holding there was no *Crawford* violation, the Court stated:

> . . . the "statements" in question are alleged to be the assertions that Washington's blood sample contained PCP and alcohol. But those statements were never made by the technicians who tested the blood. The most the technicians could have said was that the *printed data* from their chromatograph machines showed that the blood contained PCP and alcohol. The machine printout is the only source of the statement, and no *person* viewed a blood sample and concluded that it contained PCP and alcohol. . . . the very same data that would have permitted the lab technicians to say that the blood contained PCP and alcohol were also seen and interpreted by Dr. Levine. . . . The technicians could neither have affirmed or denied *independently* that the blood contained PCP and alcohol because all the technicians could do was to refer to the raw data printed out by

> the machine. . . . Whether the machines properly reported PCP or alcohol is determined by the raw data that the machines generated, and its truth is dependent solely on the machine. 498 F.3d at 229-230.

The court went on to state that the printouts from the chromatograph are not out-of-court statements covered by the Confrontation Clause, and that such an instrument could not make a statement under the definitions in FRE 801, because a statement could only be made by a person. The New Mexico rules of evidence, based on the federal rules, have the same definitions. NMRE 11-801.

This point is all the more salient when placed in the context of the volume and mass production process that is the reality of modern forensic toxicology and blood alcohol analysis. A review of some statistics from national sources and various regional crime labs illustrates the point. In addition to being printed documents, each of these sources is available online. The "Census of Publicly Funded Crime Laboratories, 2005," supra, reported (at p. 10 of the bulletin) that nationwide, the number of toxicology analysis requests was a mean number of 780 requests per examiner per year. The Cuyahoga County Coroner, in Ohio, was reported to have performed 35,000 toxicology tests in an eight year period, with a staff of two Ph.D.s and seven other forensic science professionals, an average of 486 cases per analyst per year. See Alexy, "Computer Assisted Systems for Forensic Toxicology," *The International Journal of Forensic*

Computer Science (2009) 1, 42-48. The 2009 Annual Report of the Travis County, Texas Office of the Medical Examiner showed a total of 7,859 toxicology tests performed, by five toxicologists, an average annual caseload of 1,572 tests per toxicologist in that year. The 2009 report of the California Crime Laboratory Review Task Force showed that statewide, for California crime labs, in 2007 the number of requests for blood alcohol analysis (breath analysis and blood toxicology analysis combined in a single figure) was 186,132, which were performed by only 37 analysts statewide, an average of 3,220 cases per analyst for that year. See *An Examination of Forensic Science in California*, by California Crime Laboratory Review Task Force, p. 64. Even if only one-half of these cases were blood alcohol toxicology analysis (as opposed to breath analysis), and all 37 criminalists worked on all of the toxicology cases, rather than having some work just on breath analysis, and some just on blood analysis (the combined assumptions being overly conservative), each criminalist would still average well over 1,000 toxicology blood alcohol cases per year.

The modern lab conducts the analysis of this high volume of samples in a batch process, using instruments like that described by Mr. Razatos in this case (the gas chromatograph), often equipped with an autosampler (a tray holding numerous samples, feeding them into the machine in an automated robotic operation). See *Principles of Forensic Toxicology*, Barry Levine, ed., American Association of Clinical

Chemistry Press, 2003, pp. 37, 69; *Modern Practice of Gas Chromatography*, 4th ed., Robert Grob and Eugene Berry, ed., John Wiley & Sons, Inc. 2004, p. 530. As a RAND study on crime fighting technology described, with an autosampler dozens of samples can be loaded at the end of the day into the gas chromatograph, which will analyze them overnight, and the data can then be reviewed by staff the next morning, making the most efficient use of the equipment and personnel. Schwab, Davis and Jackson, *Challenges and Choices for Crime Fighting Technology – Federal Support of State and Local Law Enforcement*, RAND Publications, 2001, p. 76, fn. 29.

Many crime labs now have internet websites with photos which illustrate these computerized, automated machines involved in modern toxicology analysis. Just a few of the many examples readily found are: University of Albany, Department of Chemistry, Forensic Chemistry Laboratory website: http://www.albany.edu/chemistry/forensics_instrumentation.shtml; U.S. Navy Drug Screening Laboratory, Great Lakes Illinois, Virtual Tour, p. 27 of 29: www-nehc.med.navy.mil/downloads/field_activities/NDSLGL_Virtual_Tour_May10.pps;[6] Sacramento District Attorney's Office website, Laboratory of Forensic Services, Toxicology webpage: http://www.sacda.org/crimelab/toxicology.htm.

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[6] The Navy Drug Screening Laboratory virtual tour webpage downloads as a PowerPoint presentation for viewing; the referenced photos are at slide 27 of the PowerPoint.

One of these photos illustrates the type of automated instrument commonly used and is reproduced in the appendix.

Using such equipment, an individual analyst may handle a hundred or more samples in a month, feeding them in batches into the instruments, then returning to the machine when it is done to review the data printouts. When the case comes to trial months later and that analyst testifies, it is implausible that he/she will recall the specifics of loading any particular sample into the machine months before. Instead, the analyst will quite properly rely on his/her custom and practice, past recollection recorded, equipment maintenance and usage records, and the conclusions that he/she can draw from the computer recorded printout. In this setting, as a practical matter, the testimony of the person designated in the lab report as the analyst for that particular case, and a lab supervisor like Razatos, are no different.

A rule that would prohibit the testimony of a supervising lab expert like Razatos would not only impact blood alcohol and other forensic toxicology cases. An important branch of forensic science that would also be significantly affected is forensic pathology. Indeed, the field of forensic pathology presents many of the same issues as forensic toxicology blood alcohol analysis, but in some ways magnified.

An autopsy will involve the examination and dissection of the body, with the pathologist's observations recorded at or near the time they are made, the

taking of photographs, x-rays, body fluid samples for toxicology examination and tissue slide samples for microscopic examination. See *Knight's Forensic Pathology*, Pekka Saukko and Bernard Knight, Edward Arnold (Publisher), 2004, pp. 29-32, 35; *The Pathology of Homicide*, Lester Adeslon, Charles C. Thomas (Publisher), 1974, pp. 63-65, 68, 70-101. These materials serve not only in the immediate examination, study and conclusions at the time the autopsy is pending, but also for future reference in the event of later investigation, or in cases of homicide, a future criminal trial. Any trial will take place months later, perhaps a year or more later. Indeed, with modern investigative techniques, it has been possible to re-examine unsolved cases that are many years old, and conclusively identify the perpetrator years after the crime. See, e.g., *People v. Nelson,* 43 Cal.4th 1242 (2008), in which the 1976 rape-murder of a 19-year-old college student was solved 26 years later in 2002 through DNA analysis.

It does not take a geriatric specialist, or a mortality rate actuary, to recognize that in many of these cases, the original pathologist will no longer be available when the crime is solved and the case brought to trial. But availability or unavailability has no constitutional significance if the Confrontation Clause applies to the evidence at issue, and the defendant has not had a prior chance to cross-examine the witness. *Crawford* and *Melendez-Diaz* point out that, "absent a showing that [the witnesses covered by the confrontation clause] were unavailable to testify at

trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the [witnesses] at trial." *Crawford*, supra, 541 U.S. at 54; *Melendez-Diaz*, supra, 557 U.S. at ___, 129 S.Ct. at 2532 (emphasis in the original).

Should the Court in the blood alcohol case at bar set out a rule so broad that it would bar the testimony of a substitute pathologist who had reached his/her own opinion after reviewing the autopsy report, records, notes, photos, and x-rays of the original pathologist, the result would be that in many murder prosecutions, the prosecution would be left without the means of proving the manner and cause of death, or authenticating post-mortem samples important for forensic analysis. Given that there is no statute of limitations for murder, and that modern DNA technology now permits conclusive identification of many homicide perpetrators years, even decades after the crime, this is a shocking result.

Just as with blood alcohol toxicology, the import of such a rule should be considered in light of the reality of forensic pathology practice. A murder trial will commonly take place at least one year, and in some instances a decade or more, after the autopsy. The National Association of Medical Examiners (NAME) sets a caseload of up to 250 autopsies per examiner per year, as a normal caseload. A caseload in excess of that figure is considered a "Phase I" deficiency for NAME accreditation purposes, with 325 autopsies per year or more marking a more serious "Phase II" deficiency. See *Forensic Pathology*, Vincent

DiMaio, et al., 2d Ed., CRC Press, 2001, p. 19; NAME Accreditation Checklist, pub. 11/3/09, p. 25; *Strengthening Forensic Science in the United States: A Path Forward*, National Academies Press, 2009, pp. 9-13.

Examples from major forensic pathology agencies add further insight into case load levels. The office of the Chief Medical Examiner for New York City, according to its website, employs approximately 32 medical examiners, who perform approximately 5,500 autopsies per year, or approximately 172 autopsies per year for each examiner. See www.nyc.gov/html/ocme, menu pages for "About OCME, Authority and Responsibilities." The King County, Washington Medical Examiner's Report for 2008 shows seven members of the Pathology Department (excluding the forensic anthropologist) responsible for 1,232 autopsies, or 176 autopsies per examiner per year. See "King County Medical Examiner's Office 2008 Annual Report," pp. 7 and 119. The Arkansas State Medical Examiner's Office employs four medical examiners who conduct 1000 autopsies per year, approximately 250 per examiner. See Arkansas State Crime Laboratory website, State Medical Examiner webpage: http://www.crimelab.arkansas.gov/sectionInfo/Pages/StateMedicalExaminer.asp.

Based on these figures, if a trial takes place just a year after the autopsy, the pathologist can be expected to have performed 150 to 250 autopsies since the one at issue in the trial; and of course, hundreds, perhaps thousands before that, depending on the

length of the pathologist's career. If the trial occurred ten years after the crime, the pathologist would have performed more than one thousand, and perhaps more than two thousand autopsies. To suggest that the original pathologist would remember individual case details beyond those which were documented and recorded for the autopsy report, or were preserved for later review in the autopsy photos, x-rays, tissue slides, and other autopsy records, is simply not realistic.

The autopsy situation will thus play out much like the situation involving a supervising toxicology examiner like Razatos. When the original pathologist testifies in a homicide case months or years after the autopsy, he/she will quite properly rely on custom and practice, past recollection recorded, the business records of the autopsy description, records, and photos that he/she used to contemporaneously record and document the autopsy examination conducted months or years before the testimony at trial. A qualified substitute pathologist would review exactly the same material in reaching a conclusion and testifying to it at trial (just as Razatos did with respect to the blood alcohol evidence in the case at bar). In such a circumstance, whether the testimony comes from the pathologist who actually performed the autopsy, or one who later reviewed the autopsy report, records, x-rays, slides and photographs and reached his/her own opinion, the resulting testimony, both on direct and cross-examination, will be much the same.

There is one major striking difference between the toxicology situation and the pathology situation. In the toxicology situation, although the chain of custody was disturbed by the original analyst, and the mere opening of the blood tube for the first test may have reduced the alcohol amount somewhat through evaporation, it would usually still be possible to retest what remained of the blood sample (assuming the sample had been saved). In the pathology situation, it would commonly and usually be impossible years after the event to repeat the autopsy examination with a new pathologist. The adoption of petitioner's proposed rule would serve as an effective bar to many murder prosecutions, notwithstanding the fact that qualified pathologists can and do rely on past autopsy materials and records produced by other practitioners to reach a professionally reliable opinion as to cause of death (just as physicians in other branches of medicine rely on the work of other practitioners in reaching opinions and making patient treatment decisions).

In terms of meaningful confrontation, the defense certainly has the ability to establish that the source of the facts behind the opinion of the supervising toxicology analyst, (or the later pathologist, as the case may be) is the work of an earlier analyst or examiner. Should the defense wish to impugn the work history or practices of the original examiner or pathologist by bringing out that person's past history, such could readily be done through cross-examination

of the testifying expert, or by other means, just as would be the case if the original expert had testified.

But even if the original pathologist was available to testify, his or her testimony about an autopsy conducted years ago, after a career involving hundreds, or thousands of autopsies, would not be any more constitutionally meaningful than the testimony of another qualified pathologist who reviewed the same material the original pathologist would now review in preparation for testimony about one particular autopsy out of hundreds, or thousands of autopsies. The same is true of a qualified blood alcohol toxicologist who was not the original analyst, but is familiar with the chemical science, the testing instrument, the records keeping system, and the practices and procedures of the particular laboratory.[7]

Viewed in this light, one can readily see that the opportunity for constitutionally meaningful confrontation can be had just as readily through the testimony of a current qualified analyst or pathologist who has reviewed the same records and material, as it could be through the testimony of the original forensic analyst or pathologist. Put another way, insistence on the presence at trial of the original analyst or

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[7] Forensic toxicology and pathology are only two examples of this practical issue – DNA analysis of crime scene or post-mortem biological material that was entirely consumed by the original testing, lifting of latent fingerprints from a crime scene, collection of sexual assault physical evidence, and many other forensic disciplines carry potential for the same problem.

pathologist does not bestow on the defendant any significant advantage in the actual confrontation that does not exist with the testimony of a supervising analyst or other qualified pathologist. For these reasons, the testimony of Mr. Razatos in the case at bar provided petitioner with constitutionally meaningful and adequate confrontation.

With this understanding, one can re-read with true appreciation the wisdom embodied in *Melendez-Diaz*, footnote 1: " . . . it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. . . . but what testimony is introduced must (if the defendant objects) be introduced live." Live testimony is what happened here. The original lab analyst was just one person in the chain of custody, but the physical chemical steps were done by a laboratory instrument, which produced data printouts. The original analyst could certainly review, understand, and interpret the data produced by the gas chromatograph, and explain the process that produced it, but so could the supervisor Razatos. The testimony of Razatos protected the defendant's right to confrontation, to challenge through cross-examination the analysis and testing process, as meaningfully as the testimony of the original analyst would have.

CONCLUSION

Melendez-Diaz did not alter the fundamental rule in the field of expert evidence that an expert may base an opinion on the work of another expert. In the real world of modern forensic toxicology analysis, a criminal defendant's right to confront, cross-examine and test a forensic opinion on such a matter as blood alcohol toxicology opinion is meaningfully protected through the testimony of a supervising analyst such as Razatos. The adoption of petitioner's proposed rule would, in the rigid pursuit of formalism without regard to real world practice or consequences, significantly impact forensic science and crime laboratory operations. Insistence on the presence of the person designated through lab procedure as "the analyst" will not secure for a criminal defendant any added benefit in actual confrontation beyond that which the defendant has when a supervisor such as Razatos testifies. Yet in the quest for perfect confrontation, petitioner's proposed rule would bar reliable evidence, and in many instances entire prosecutions, without giving a criminal defendant any true advantage in the quality of the confrontation that actually takes place in the trial court.

For the foregoing reasons, amici curiae respectfully request that the ruling of the New Mexico Supreme Court be affirmed.

Date: January 17, 2011

Respectfully submitted,

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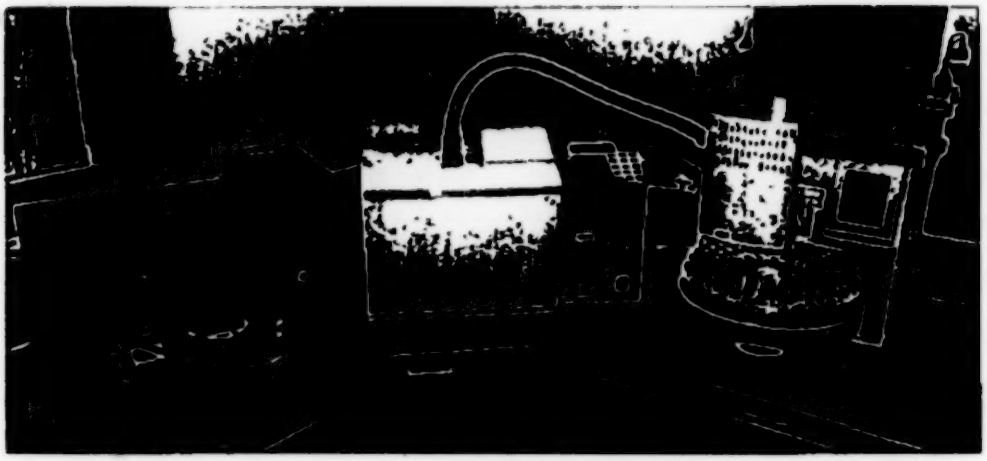

Photo from Sacramento County District Attorney's Office Laboratory of Forensic Services website: http://www.sacda.org/crimelab/toxicology.htm

AMICUS CURIAE BRIEF

No. 09-10876

Supreme Court, U.S.
FILED
DEC 7 - 2010

IN THE
Supreme Court of the United States

DONALD BULLCOMING,
Petitioner,

v.

NEW MEXICO,
Respondent.

On Writ of Certiorari to the New Mexico Supreme Court

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER	1
STATEMENT OF INTEREST OF *AMICI CURIAE*	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. *CRAWFORD* RECOGNIZED THAT NECESSITY SOMETIMES COMPELS A SECOND-BEST SOLUTION TO FULL CONFRONTATION, AND SURROGATE WITNESSES MAY OFFER SUCH A SOLUTION IN LIMITED CIRCUMSTANCES	11
II. THE PROPOSED TEST HAS SALUTARY EFFECTS ON BOTH FORENSIC SCIENCE PRACTICE AND EVIDENCE DOCTRINE	19
A. Forensic science evidence will benefit from better documentation	20
B. This test provides a framework for forging a tenable relationship between Federal Rule of Evidence 703 and the Confrontation Clause	21
III. A DECISION IN PETITIONER'S FAVOR WILL NOT UNDULY BURDEN THE CRIMINAL JUSTICE SYSTEM	25

TABLE OF CONTENTS—Continued

Page

A. Burdens Relating to Forensic Evidence Are and Will Continue To Be Alleviated By Stipulations and Waivers 26

1. Stipulations..... 26

2. Notice-and-Demand Statutes..... 30

B. Laboratory Procedures Can Be Modified to Reduce the Risk of Exclusion under the Confrontation Clause 31

CONCLUSION 33

TABLE OF AUTHORITIES

CASES — Page

Brookhart v. Janis, 384 U.S. 1 (1966) 26
Brooks v. Commonwealth, 638 S.E.2d 131 (Va. Ct. App. 2006) 30
California v. Trombetta, 467 U.S. 479 (1984) 32
Commonwealth v. Avila, 912 N.E.2d 1014 (Mass. 2009) 24
Crawford v. Washington, 541 U.S. 36 (2004) ..... *passim*
Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) ..... *passim*
People v. Lovejoy, 919 N.E. 2d 843 (Ill. 2009) 24
People v. Rutterschmidt, 98 Cal. Rptr. 3d 390 (Cal. Ct. App. 2009), *rev. granted*, 102 Cal. Rptr. 3d 281 (Cal. 2009) 22
People v. Williams, No. 107550, 2010 WL 2780344 (Ill. July 15, 2010) 22, 23
State v. Lackey, 120 P.3d 332 (Kan. 2005), *overruled in part on other grounds by State v. Davis*, 158 P.3d 317 (Kan. 2006) ... 14
State v. Lui, 221 P.3d 948 (Wash. Ct. App. 2009), *rev. granted*, 228 P.3d 17 (Wash. 2010) 22, 24
State v. Miller, 790 A.2d 144 (N.J. 2002) 29
State v. Mitchell, 4 A.3d 478 (Me. 2010) 24
United States v. Williams, No. 09-0026, 2010 U.S. Dist. Lexis 110464 (D.D.C. 2010) 14
United States v. Olivares-Vega, 495 F.2d 827 (2d Cir. 1974) 27, 28
United States v. Spann, 515 F.2d 579 (10th Cir. 1975) 27, 28

TABLE OF AUTHORITIES—Continued

Page

Vann v. State, 229 P.3d 197 (Alaska Ct. App. 2010) 24

CONSTITUTION

U.S, Const. amend. VI ..... *passim*

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Fed. R. Evid. 703 ..... 21, 22, 23, 25
N.M R. Evid. Rule 11-703 21

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Erin E. Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L. J. 489 (2008) 4, 24

TABLE OF AUTHORITIES—Continued

Page

Erin E. Murphy, *Inferences, Arguments and Second Generation Forensic Evidence*, 59 HASTINGS L.J. 1047 (2008) 4

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Erin E. Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291 (2010) 4

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Page

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Paul C. Giannelli & Edward J. Imwinkelried, SCIENTIFIC EVIDENCE (4th ed. 2007, 2010 Supp.) 3, 7, 20

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Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure:* Crawford's *Birth Did Not Require that* Roberts *and* Wright *Had to Die*, 15 J. L. & POL'Y 685 (2007)..... 3

Robert P. Mosteller, Crawford's *Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411 (2005)..... 3

Robert P. Mosteller, *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICHMOND L. REV. 511 (2005)..... 3

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TABLE OF AUTHORITIES—Continued

Page

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Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917 (2007)..... 3

Various eds., *Criminal Law Advocacy* (Matthew Bender (now Lexis Publishing))..... 28, 29

IN THE

Supreme Court of the United States

No. 09-10876

DONALD BULLCOMING,
Petitioner,

v.

NEW MEXICO,
Respondent.

On Writ of Certiorari to the New Mexico Supreme Court

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Amici curiae respectfully submit this brief in support of Petitioner pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to reverse the judgment of the Supreme Court of the State of New Mexico.

[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are on file with the Clerk's Office.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are evidence professors who have studied, taught, and published extensively on the interaction between expert testimony and the Confrontation Clause or other aspects of expert evidence and its admissibility. This case involves a critical test of Confrontation Clause jurisprudence: whether after *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court should permit a surrogate expert to introduce forensic reports prepared by a different expert. Each *amicus* has devoted a significant portion of his or her research agenda to issues surrounding the use of expert evidence, and several of the *Amici* have specifically focused on the intersection between expert evidence and the Confrontation Clause.

Jennifer L. Mnookin is Professor of Law at U.C.L.A. Law School and Founding Co-Director of the Program on Understanding Law, Science, and Evidence (PULSE). She has written extensively on expert evidence, forensic science evidence, and other topics. Her article, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J. L. & POL'Y 791 (2007), specifically examines the intersection between the Confrontation Clause and expert testimony. She is a co-author with Professors David Kaye and David Bernstein, of the treatise, THE NEW WIGMORE: EXPERT EVIDENCE (2003; 2d ed., forthcoming 2010), and has served as chair of the Evidence Section of the American Association of Law Schools. She has written numerous articles about the validity, research basis, and admissibility of forensic science evidence, and is presently a member of several forensic science commissions.

Paul C. Giannelli is the Albert J. Weatherhead III & Richard W. Weatherhead Professor of Law at Case Western Reserve University. He has authored or co-authored eleven books, including SCIENTIFIC EVIDENCE (4th ed. 2007) with Professor Edward Imwinkelried, as well as numerous articles, book chapters, reports, and columns on scientific evidence. He served as Reporter for the ABA Criminal Justice Standards on DNA Evidence; as co-chair of the ABA Ad Hoc Committee on Innocence; as a member of the National Academy of Sciences committee on the evidentiary use of bullet lead analysis; and as chair of the Evidence Section of the American Association of Law Schools.

Robert P. Mosteller is the J. Dickson Phillips Distinguished Professor of Law at the University of North Carolina School of Law. He has written on a variety of evidentiary topics, including several articles on the Confrontation Clause under *Crawford*. His articles include: Giles v. California: *Avoiding Serious Damage to* Crawford's *Limited Revolution*, 13 LEWIS & CLARK L. REV. 675 (2009); *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917 (2007); *Confrontation as Constitutional Criminal Procedure:* Crawford's *Birth Did Not Require that* Roberts *and* Wright *Had to Die*, 15 J. L. & Pol'y 685 (2007); *Softening of the Formality and Formalism of the "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 429 (2007); Crawford's *Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411 (2005); and *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICHMOND L. REV. 511 (2005).

Erin E. Murphy is Professor of Law at the NYU School of Law. An expert on criminal law, criminal procedure, and evidence, her research focuses on questions related to new technologies and forensic evidence in the criminal justice system. She has written extensively in the area of forensic DNA typing, including *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L. J. 489 (2008); *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721 (2007); *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291 (2010); and *Inferences, Arguments and Second Generation Forensic Evidence*, 59 HASTINGS L.J. 1047 (2008). She recently joined as a co-author of MODERN SCIENTIFIC EVIDENCE, a leading treatise in the field, and serves as an advisor to numerous forensic research institutes.

D. Michael Risinger is the John J. Gibbons Professor of Law at Seton Hall University School of Law. He is a past chair of the Association of American Law Schools Section on Civil Procedure, the past chair of the AALS Section on Evidence, a life member of the American Law Institute, and was for 25 years a member of the New Jersey Supreme Court Committee on Evidence, which was responsible for the current version of the New Jersey Rules of Evidence. For more than two decades he has been at the center of the debates on forensic science reliability and the law. He is the author of two chapters in FAIGMAN, KAYE, SAKS AND CHENG, MODERN SCIENTIFIC EVIDENCE ("Handwriting Identification" and "A Proposed Taxonomy of Expertise"). He is also the author of articles on a diverse range of subjects, including many articles on expert evidence issues.

SUMMARY OF THE ARGUMENT

Except in rare instances, the use of surrogate experts should be prohibited under the Confrontation Clause of the Sixth Amendment. In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), this Court properly held that certain expert reports are testimonial in character and, thus, can only be admitted at trial if the expert who wrote the report is made available for cross-examination. The Court acknowledged that compliance with this constitutional command might be inconvenient for law enforcement officials but recognized that there was no principled justification for exempting testimonial forensic science evidence from the Confrontation Clause's purview. *See* 129 S. Ct. at 2540 ("The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination.").

The instant case flows, perhaps predictably, from attempts to circumvent the Court's holding. Efforts to introduce scientific reports into evidence through the testimony of a surrogate witness—someone other than the person who actually conducted or witnessed the test at issue—seriously threaten to undermine the Court's holding in *Melendez-Diaz*. This evasion should not be countenanced by the Court, both as a matter of doctrinal consistency and because it fails adequately to protect the defendant's Confrontation right; and also because the purported burdens on law enforcement officials are not, in fact, especially severe.

Moreover, those burdens can be lessened even further because the confrontation right recognized by this Court in *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny, can include certain "safety

nets" arising from necessity. We strongly urge the Court to recognize that the testimony of surrogate experts should not be permitted as a general matter. But we also believe that, in limited circumstances, grounded in both necessity and in the adequacy of the materials on which the surrogate can rely, it is legitimate under the Confrontation Clause to employ surrogate witnesses as a "second-best solution," just as *Crawford* permits the second-best solution of using prior sworn testimony upon a sufficient showing of unavailability. Rejecting surrogates as a general matter, but permitting them in narrowly delimited circumstances, would protect the principles underlying the Confrontation requirement while simultaneously lessening the burdens imposed by *Melendez-Diaz* in a manner both manageable and consistent with the dictates of justice.

Amici urge the Court to adopt a rule in this case that both recognizes the signal importance of the confrontation right and simultaneously avoids injustice by permitting the testimony of a surrogate expert *only* if (1) the original expert is genuinely unavailable through no fault of either party; (2) re-testing or re-analyzing the materials at issue is not a feasible option; and (3) the original test conditions were documented with sufficient particularity and detail as to permit the surrogate expert to exercise substantial independent judgment in forming an expert opinion on the matter.

ARGUMENT

This Court recognized the testimonial character of certain expert certifications in *Melendez-Diaz, supra*. The reports in that case were sworn affidavits of analysis that reported that a powdery substance inside bags seized by the police was cocaine. *Id.* at

2531. An expert indisputably created the certifications for the purpose of having them available for use in legal proceedings. *Id.* Not only were the certificates both conclusory and cursory, failing even to state what specific tests were actually conducted, but they were introduced without any testimony from the analyst who conducted the tests. When the expert who created the certifications did not testify at trial, the defendant was denied any opportunity to probe the expert's bias, incompetence, or methodology, or to inquire into alternative tests or any interpretive issues surrounding either the tests or the results. In a "rather straightforward application of our holding in *Crawford*," this Court held that the expert's certifications "quite plainly" fell within the "core class of testimonial statements" barred from a trial unless the expert-declarant was available for cross-examination. *Id.* at 2533, 2532, 2531.

The Court's holding was consistent with virtually all of the available scholarship on this issue. *See, e.g.*, Edward J. Imwinkelried, *"This is Like Déjà Vu All Over Again": The Third, Constitutional Attack on the Admissibility of Police Laboratory Results in Criminal Cases*, 39 N.M. L. Rev. 303 (2008) ("Imwinkelried"); Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 504-05 (2006) ("Metzger"); Jennifer Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & Pol'y 791, 797-801 (2007) ("Mnookin"); Recent Case, *Evidence—Confrontation Clause—Second Circuit Holds that Autopsy Reports Are Not Testimonial Evidence—United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3438 (U.S. Feb. 20, 2007) (No. 06-8777), 120 Harv. L. Rev. 1707 (2007); *see also* PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 6.04(c) n.233 (2010 Supp.);

("GIANNELLI & IMWINKELRIED") (collecting cases for the proposition that "lab reports are testimonial in nature"); DAVID KAYE, DAVID BERNSTEIN & JENNIFER MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE § 3.10 (2009 Supp.).

Notwithstanding that several states already used procedures similar to those required by *Melendez-Diaz* and required forensic science results to be introduced by live testimony in the absence of a stipulation, the law enforcement community complained that applying *Crawford* to forensic science would create significant burdens for their forensic analysts. *See, e.g.*, *Melendez-Diaz*, 129 S. Ct. at 2549 (Kennedy, J., dissenting) (discussing projections of "enormous costs on the administration of justice"). Given this perception, it is perhaps not surprising that, in the wake of *Melendez-Diaz*, there have been efforts by both prosecutors and other law enforcement officials to apply the Court's holding in an unjustifiably narrow manner.

New Mexico used one such tactic in the instant case: offering live expert testimony but *not* from the expert-declarant who authored the original report or certification being offered into evidence. The testifying expert had played no role in the execution of the tests at issue. In this way, the State exposed *an* expert witness to cross-examination, to be sure, but it was an expert unable to answer questions about the precise tests performed by the original expert, his possible biases, or his methodology. While the testifying employee was an employee of the laboratory that had conducted the tests, he had neither participated in nor witnessed the tests about which he testified. He could not testify to what had occurred during testing; as he acknowledged on the stand,

"you don't know unless you actually observe the analysis that someone else conducts, whether they followed th[e] protocol in every instance." JA 59.

New Mexico's use of a surrogate elevated form over substance in violation of the Confrontation Clause. Just as in *Melendez-Diaz*, the State introduced into evidence a testimonial affidavit whose creator was never subject to cross-examination. This tactic unmoored the Sixth Amendment's requirement of in-court testimony from its constitutional underpinnings; the Confrontation Clause demands in-court testimony *to permit confrontation* of any testimonial evidence, not simply to encourage testimony for its own sake.

Amici adopt Petitioner's well-developed, persuasive argument that New Mexico's evasion in this case was a denial of the Confrontation right guaranteed by the Sixth Amendment. If forensic laboratories were permitted to introduce the testimony of *any* employee about any test, a defendant's Confrontation rights would be eviscerated. As the Petitioner's brief argues, the structural underpinnings of the Confrontation right—from the ability to jury to assess demeanor, to the oath, to the ability to prove what was done by *this* examiner when conducting the specific tests in *this* case—are all best served through the testimony of the actual analyst, not simply an expert knowledgeable about how certain tests are generally conducted. Cross-examining a surrogate expert about a report that he has read is not the equivalent of cross-examining the report's actual creator, just as cross-examining a detective who took an affidavit is not equivalent to cross-examining the actual declarant. Moreover, as *Melendez-Diaz* noted, "Confrontation is designed to weed out not only the

fraudulent analyst, but the incompetent one as well." 129 S. Ct. at 2537. Cross-examining a surrogate expert who did not personally observe any of the events reported, in lieu of the actual analyst who conducted the test, will necessarily be less effective at ferreting out incompetence, fraud, and other weaknesses or limitations that might not be apparent on the face of the report. KAYE, BERNSTEIN & MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE, § 4.10.2 (2d ed., forthcoming 2010).

Amici therefore strongly urge the Court not to accept, as a matter of course, surrogate witnesses in lieu of the actual expert-declarant who conducted the forensic tests being offered in evidence. However, we also recognize that an absolute ban on utilizing the results of scientific tests performed by a now-unavailable expert might neither be mandated by the Confrontation Clause nor be appropriate in all circumstances. We would therefore suggest that in limited instances—when the original expert is genuinely unavailable; when re-testing by an alternative, available expert is not feasible; and when the original expert recorded her processes and findings in sufficient detail both to allow a surrogate expert to exercise substantial independent judgment about the appropriate results of these tests—the use of a qualified surrogate expert would be both consistent with the Confrontation Clause and in the interests of justice. *See* Mnookin, *supra*, at 854-55; KAYE, BERNSTEIN & MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE § 3.10 (2009 Supp) & § 4.10 (2d ed., forthcoming 2010).

In this case, importantly, there was no showing that the original expert was unavailable. Moreover, even if the expert had been unavailable, the lab's

standard procedure was to retain part of the defendant's blood sample. Re-testing by a second expert would have been feasible, in which case, this second expert could have testified consistent with the Confrontation Clause. JA 52. New Mexico did not seek re-testing and instead attempted to smuggle one expert's test results through the testimony of a different expert.

Thus, while *Amici* believe that some carefully delimited circumstances justify the use of a surrogate witness, those circumstances are clearly not present in this instance. *Amici* urge the Court in this case to craft its decision in a way that remains true to the Confrontation guarantee of the Sixth Amendment and restricts the use of surrogate experts to those limited circumstances when necessity, combined with the quality of the original documentation, makes their use both appropriate under the Confrontation Clause and in the interests of justice.

I. *CRAWFORD* RECOGNIZED THAT NECESSITY SOMETIMES COMPELS A SECOND-BEST SOLUTION TO FULL CONFRONTATION, AND SURROGATE WITNESSES MAY OFFER SUCH A SOLUTION IN LIMITED CIRCUMSTANCES.

Crawford acknowledges that necessity has a legitimate—albeit limited—role to play in Confrontation Clause analysis. In *Crawford*, the Court noted that the Confrontation Clause permitted the introduction of a now-unavailable witness's testimonial statements if the defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 54. Within *Crawford*'s schema, a prior opportunity to cross-examine the witness is a second-best solution, not a perfect replacement for cross-examination in front of

the current jury. This conclusion is both a matter of common sense and implicit in *Crawford*'s logic: If a prior opportunity to cross-examine were the evidentiary equivalent of contemporaneous cross-examination, there would be no justification for imposing an unavailability requirement before its use. Use of such prior testimony is not permitted indiscriminately, but it meets the minimum constitutional standards for confrontation only because of the necessity occasioned by the witness's unavailability at trial. *Crawford*, therefore, indicates that, at least in some circumstances in which there is a meaningful but imperfect substitute for contemporaneous cross-examination, the Constitution does not command wholesale exclusion. The prior opportunity for cross-examination will suffice but only when a present opportunity cannot be had.

We believe that analogous logic applies to the use of surrogate experts testifying about testimonial forensic science reports. *Melendez-Diaz* correctly recognized that forensic science ought not to be treated differently under the Confrontation Clause than other, non-expert forms of evidence. It cannot simply be presumed to be reliable or unbiased or otherwise outside the ambit of what might be usefully examined on cross-examination. As *Melendez-Diaz* recognized, "neutral scientific testing" may not necessarily be either neutral or reliable. 129 S. Ct. at 2536; *see also* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, 4-8, 22-4 (2009) ("NAS Report"). Nor, for that matter, is reliability even the appropriate focus in the post-*Crawford* Confrontation Clause analysis. *See, e.g.*, *Melendez-Diaz*, 129 S. Ct. at 2536; *Crawford*, 541 U.S. at 61-62.

Amici, of course, recognize that experts will not always have a specific memory of the forensic tests that they have conducted. The same is potentially true of nonscientific witnesses who made testimonial statements, and a declarant's failure to have a specific memory of what is memorialized in a testimonial statement does not make the Confrontation Clause inapplicable. Even if forensic experts may lack a specific memory of the underlying events more often than non-experts testifying about statements deemed testimonial, this does not justify diminishing the Confrontation right by permitting the routine use of a surrogate witness who played no part in the actual testing. While the expert who conducted the test at issue may not always have a specific memory of the tests he conducted, there is no doubt that he sometimes will. Moreover, examining his test results and/or notes may well jog his own memory of facts not included in the report. In addition, the ability to cross-examine the actual expert—not someone else with similar expertise—offers the fact-finder significantly better information about this particular expert's experience, credentials, abilities, and credibility. It allows the defense to probe the context surrounding the analyst's analysis, such as conversations the analyst had with peers or investigators about the case, or the analyst's working conditions at the time of testing. It also ensures that the expert who performed the tests will be available to explain actual, as opposed to speculative or conjectural, reasons why certain approaches were taken, methods explored, and/or conclusions drawn.

However, it is certainly true that witnesses who testified at preliminary hearings or at an earlier trial may sometimes become unavailable by the time their testimony is needed again at the trial itself. For

instance, experts may die or leave their government employment or move away from the jurisdiction or otherwise be unable to testify for a multitude of reasons unattributable to any fault of law enforcement officials. Indeed, the more time between the forensic test and its use in court, the greater the chance that the expert who conducted the test will no longer be available.

Several lower court cases, both before *Melendez-Diaz* and afterwards, wrestled, for example, with the issues surrounding the Confrontation Clause requirements for testimony relating to autopsies establishing the cause of death, conducted by a now unavailable or otherwise absent examiner. *See e.g.*, *United States v. Williams*, No. 09-0026, 2010 U.S. Dist. Lexis 110464, at *11-*13 (D.D.C. 2010); *State v. Lackey*, 120 P.3d 332, 351 (Kan. 2005), *overruled in part on other grounds by State v. Davis*, 158 P.3d 317, 322 (Kan. 2006). The original autopsy is not only likely to be the best available evidence regarding cause of death, but it is also unlikely that there will be any substitute, non-testimonial equivalent evidence to establish the facts and conclusions contained in the autopsy. In many instances, the unavailability of the original forensic expert is in no way the fault of law enforcement officials. In circumstances like these, we submit that there may be alternatives to wholesale exclusion that, while second-best, may meet the constitutional mandate for confrontation.

While we do not offer a detailed test or definition of unavailability in the context of a forensic examiner, we believe that surrogate experts should be a viable alternative only when the original expert is genuinely unavailable, not merely when it is merely

inconvenient for him to testify. An examiner who is still employed by the relevant laboratory, but who happens to be conducting other business or testifying elsewhere, certainly ought *not* to be deemed unavailable. By contrast, a deceased examiner obviously is. Precisely where to draw the line between the obvious extremes is a matter that can be worked out by the lower courts, should unavailability be established as a prerequisite for the use of a surrogate. But given that this use of a surrogate is a second-best and inferior method for vindicating the Confrontation right, the standard for a finding of unavailability should be appropriately high, going far beyond simple inconvenience to either the witness or the prosecuting authority.

Before courts permit any use such surrogate experts to testify, however, they should also establish that it is not feasible to conduct the original test again and thereby avoid the need for recourse to a surrogate. With some kinds of forensic materials—for example, fingerprint identification—re-testing will almost always be feasible (unless, for example, the exemplars at issue have been lost or damaged) and reasonably cost-free. With other kinds of forensic tests, such as DNA profiling or toxicological analyses or, as was at issue in this case, gas chromatography testing of blood samples for alcohol, the question will be whether enough of the material at issue remains for re-testing; in many instances, the answer will be 'yes,' as indeed it was the "standard" practice in New Mexico to retain an extra blood sample precisely for this purpose. JA 52. But in some circumstances—when the first test consumed all the available material, or when the material in need of testing is cannot easily be preserved—it will truly not be feasible for the relevant tests to be conducted again

by an available expert. In these circumstances, the question of the role of necessity in Confron tation Clause analysis resurfaces with particular significance.

We believe that the use of a surrogate witness can become legitimate when necessity (produced by the combined unavailability of the expert and the infeasibility of re-testing) is coupled with robust documentation of the test processes and results by the original analyst. For example, suppose that an autopsy report included bottom-line conclusions, but also incorporated photographs of critical findings, measurements, and descriptive detail of the bases to support its conclusions; or even suppose that the entire autopsy process was captured on videotape. If the documentation was thorough, substantial, and included not only the testing expert's conclusions, but also detailed both the tests conducted and the data generated by the tests, the surrogate witness would have the basis for exercising a substantial degree of independent judgment about the tests, their conclusions, and possible limitations. The Court's adoption of this position will pressure experts to generate reports that would enable a later expert, if necessary, to testify discerningly about the original expert's procedures and reasoning. Beyond focusing the Court's attention on the question of whether enough detail is present to permit a surrogate expert to exercise his independent judgment, *Amici* do not presume to prescribe a specific set of procedures to satisfy this documentation threshold, but other parties certainly will attempt to improve standardization and documentation as this iterative process evolves.

To be sure, even when he has access to substantial and thorough documentation, a surrogate interpreter of the report remains a second-best alternative, for he is necessarily still relying on the accuracy of the original testimonial report in his own assessment. He cannot go beyond the report itself, and must assume that it reports and draws attention to the appropriate findings, and that it discloses any unusual findings, ambiguities, or limitations. He cannot provide first-hand descriptions of conducting this particular autopsy, and on cross-examination, he cannot meaningfully respond to questions about the original examiner's thought process.

Thorough and substantial documentation, however, combined with the surrogate's own expertise, could permit the surrogate witness to become something more than a conduit for the absent witness's conclusions. Thorough documentation permits the surrogate to opine on the appropriateness of the tests and the soundness of the original expert's conclusions, assuming that they are accurately recounted. Defense counsel can meaningfully cross-examine him about alternative hypotheses, tests that were not conducted, or uncertainties relating to his interpretations. But at the same time, defense counsel is not able to ferret out what might have been left out of the report, nor probe any matters relating to the personal credibility of the original analyst. Furthermore, the surrogate is necessarily still relying for his independent judgment in part on the contents of the original analyst's report.

Thus, *Amici* believe that a surrogate expert who can exercise substantial independent judgment in analyzing a fully developed and documented report thus offers a second-best solution. Something of value

is lost, compared to the opportunity to cross-examine the original testing expert, but certainly some of the value of cross-examination is still retained. Cross-examination of the surrogate expert thus approximates the already-permitted second-best solution for the unavailable witnesses whom the defendant had a prior opportunity to cross-examine. In both circumstances, the claim of necessity justifies a substituted form of cross-examination that is less than optimal but nonetheless sufficiently meaningful to meet the constitutional minimums in the face of the necessity produced by unavailability.

We recognize that this framework gives necessity and unavailability a larger role in Confrontation analysis than *Crawford* expressly contemplates, but we submit that this proposal accords with *Crawford*'s spirit. Just as the Court has endorsed the use of prior testimony conditioned upon unavailability, the Court ought to permit a surrogate expert to testify conditioned upon both unavailability and the adequacy of the documentation and procedures followed by the original expert. If the original expert detailed his procedures with care, a surrogate might be able both to describe the tests conducted and to evaluate the results critically.

This is, to be sure, a second-best solution, and ought therefore not to be permitted without genuine unavailability. Moreover, we believe that this unavailability exception should be limited to forensic reports and scientific findings. Forensic science can rely on regularized routines and processes which can be documented in sufficient detail to permit meaningful interpretation and evaluation by others

with appropriate expertise.[2] It is the special, data-driven nature of scientific processes and scientific practice that makes the use of a surrogate expert an adequate second-best solution when necessity demands it.

We suggest, therefore, that surrogate witnesses should be prohibited under the Confrontation Clause unless three criteria are met: (1) the original expert is genuinely unavailable through no fault of either party; (2) re-testing or re-analyzing the materials at issue is not a feasible option; and (3) the original test conditions were documented with sufficient particularity and detail as to permit the surrogate expert to exercise substantial independent judgment in forming an expert opinion on the matter.

II. THE PROPOSED TEST HAS SALUTARY EFFECTS ON BOTH FORENSIC SCIENCE PRACTICE AND EVIDENCE DOCTRINE.

In addition to comporting with *Crawford*'s recognition of a legitimate role for second-best solutions when necessity demands it, this proposed test would

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[2] To be clear, our point here is not that forensic science is especially reliable, which is largely beside the point under the post-*Crawford* Confrontation Clause analysis. Rather, it is a more regularized set of processes than many other kinds of testimonial statements tend to be, and many experts are experienced at interpreting other experts' reports. Part of a forensic expert's expertise is the ability to interpret a specific kind of data to reach a conclusion; the more data that is presented by the report, the greater the expert's ability to exercise his independent judgment. While that judgment still relies on the accuracy of the absent expert's reporting, this weakness can be exposed persuasively on cross-examination, and it also explains why, in our view, the use of surrogates must be limited to instances of absolute necessity.

have salutary effects on the quality of forensic science evidence across the board.

A. Forensic science evidence will benefit from better documentation.

First, adoption of such a test would create incentives for thorough documentation and reporting of test results. Prosecutors and experts would have the incentive to generate forensic reports that were more detailed and more informative than have frequently been the case--reports which would permit other forensic scientists to offer genuine insight into the underlying scientific analyses.[3] Historically, in contrast, many expert reports produced in criminal cases have included only bottom-line conclusions. *See* GIANNELLI & IMWINKELRIED § 3.03.

Thorough documentation would permit the use of a surrogate should necessity dictate it, but it would also likely have benefits for the criminal justice system more generally. Even when the original analyst was available to testify, his ability to recount what occurred in the case would likely benefit from the report's additional detail. Moreover, more thorough reporting would quite possibly benefit both defense attorneys and prosecutors as well. Defense attorneys would have a more detailed account of what occurred, which would permit them to understand whether the tests and the results raised concerns or warranted further inquiry. And, in many instances, the additional detail might increase defense attorneys' willingness to stipulate the forensic science findings, because they would have a

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[3] Indeed, more thorough reports would also improve the ability of *original* experts to recall and explain their decision-making processes.

clearer basis for understanding precisely what those findings were and what supported them.

B. This test provides a framework for forging a tenable relationship between Federal Rule of Evidence 703 and the Confrontation Clause.

Another benefit of this proposed test is that it provides a framework for developing a workable relationship between the Confrontation Clause and Federal Rule of Evidence 703's permissive approach to the admissibility of materials upon which experts rely.[4] On the one hand, it is well established that one expert may not simply be a conduit for another absent expert. On the other hand, modern evidence law has long permitted experts to rely upon facts and data that are not themselves admissible, so long as they are of a type reasonably relied upon by experts in the field at issue. The difficult question is the following: If Rule 703 permits an expert to rely on inadmissible evidence to reach a conclusion, may a testifying expert reach a conclusion on the basis of a testimonial report written by a non-testifying analyst?

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[4] Rule 703 states: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." New Mexico's Rules of Evidence contain the same provision. Rule 11-703 NMRA.

Some courts, even in the wake of *Melendez-Diaz*, have interpreted Rule 703 to permit a non-testifying expert to describe the contents of a testimonial report upon which he has relied, so long as the report itself is not formally introduced into evidence. *See, e.g.*, *People v. Williams*, No. 107550, 2010 WL 2780344, at *9–10 (Ill. July 15, 2010); *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390 (Cal. Ct. App. 2009), *rev. granted*, 102 Cal. Rptr. 3d 281 (Cal. 2009); *State v. Lui*, 221 P.3d 948, 955–56 (Wash. Ct. App. 2009), *rev. granted*, 228 P.3d 17 (Wash. 2010). If any testifying expert is not only permitted to use Rule 703 to rely on testimonial reports produced by an absent witness, but may then go further and testify about the contents of this inadmissible testimonial material, the Confrontation Clause right becomes of little import. *See* KAYE, BERNSTEIN & MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE § 4.10.2 (2d ed., forthcoming 2010).

Other courts, including the New Mexico Supreme Court in this instance, have recognized that the Confrontation Clause must impose some limits on the use or transmittal of testimonial evidence by a surrogate. For example, at the case at bar, the New Mexico Supreme Court attempted to make a distinction between the *opinion* of a non-testifying expert, which it would have barred, and *facts or data* provided by a non-testifying expert and reasonably relied upon by experts in the field, which it deemed permissible for the testifying expert to rely upon and for the court to admit into evidence.[5] JA 17.

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[5] Some courts have attempted to justify the disclosure of reports prepared by nontestifying experts as non-hearsay, arguing that they are not being admitted for their truth, but rather to assist the jury to assess the accuracy of the expert's

This distinction is problematic. Even putting aside the difficulty of locating a boundary between fact and opinion, it is difficult to understand why the testimony of someone other than the actual analyst ought to transform any portions of a report that would clearly be testimonial, and prohibited under *Melendez-Diaz* in the absence of any accompanying testimony, into admissible evidence. If Rule 703 is interpreted to permit experts to rely upon, and subject to the balancing test, even to disclose, testimonial hearsay to the jury, it would provide a simple method by which prosecutors could subvert the Confrontation Clause's requirements. Courts ought not to permit a testifying expert to be a back door through which to smuggle a non-testifying expert's testimonial conclusions to a fact-finder.

Since *Melendez-Diaz*, numerous lower courts wrestling with the appropriate relationship between Rule 703 and the Confrontation Clause have focused on whether the testifying expert has exercised independent judgment. These courts have generally permitted testimony by an expert who is relying on the testimonial report of an absent analyst, so long as the testifying expert was engaging in meaningful interpretation, or offering independent judgment, or reanalyzing rather than simply regurgitating the information provided. *See, e.g.*, *People v. Williams*, 2010 WL 2780344, at *7 (focusing on independent

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claims. The main problem with this argument is that the fact-finder cannot use the evidence to assess the merits of the expert's claims without making a preliminary determination regarding the truth of the evidence upon which the expert relied. *See generally* Mnookin, *supra*, at 811-26; KAYE, BERNSTEIN & MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE § 3.10.1 (supp. 2009); § 4.10.1 (2d ed., forthcoming 2010).

evaluation by testifying expert); *State v. Mitchell*, 4 A.3d 478, 490 (Me. 2010) (noting that testifying expert reached conclusion about cause of death); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009); *People v. Lovejoy*, 919 N.E. 2d 843, 864 (Ill. 2009) (medical examiner engaged in meaningful interpretation); (requiring surrogate witness to confine testimony to his own opinions, and not to recite the underlying conclusions of autopsy conducted by nontestifying expert); *Vann v. State*, 229 P.3d 197, 200 (Alaska Ct. App. 2010) (holding that testifying expert did not merely review, but reanalyzed, the report's test data); *Lui*, 221 P.3d at 956 (concluding that testifying experts "applied significant expertise to interpret and analyze the underlying data").

Amici's proposed test suggests that this approach is a step in the right direction but does not go far enough in respecting the values of the Confrontation Clause. Even if the underlying report is rich in detail, there are still ways in which the testifying expert must assume its accuracy in reaching his own decision. To the extent the underlying report interprets raw data rather than merely transmitting it, and to the extent the testifying expert takes these underlying interpretations or even raw descriptions as accurate, the testifying expert is still partially accepting—and through his conclusions, transmitting—the testimonial information of the report. Even 'raw data' in the forensic sciences often incorporates a degree of interpretive judgment and subjectivity, and the interpretive methods in use in many fields also contain a significant degree of subjectivity. *See, e.g.*, Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L.J. 489 (2008);

NAS Report at 127-82. While the testifying expert may indeed be exercising independent judgment, the fact that he did not personally observe the matters at issue means that he is also relying on the report (as Rule 703 both contemplates and permits). Therefore, while the exercise of independent judgment by a testifying expert may be sufficient as a matter of evidence law for the opinion of the testifying expert to pass muster under Rule 703 it ought to be permissible under the Confrontation Clause *only in conjunction with necessity*.

III. A DECISION IN PETITIONER'S FAVOR WILL NOT UNDULY BURDEN THE CRIMINAL JUSTICE SYSTEM.

Like Respondent in *Melendez-Diaz*, the State unpersuasively claims that restricting the use of surrogate experts will have a deleterious impact on criminal prosecutions across the country. While the State's administrative and fiscal concerns are legitimate, in some respects, they cannot control the scope of the "bedrock procedural guarantee," *Crawford*, 541 U.S. at 42, provided by the Confrontation Clause. *See Melendez-Diaz*, 129 S. Ct. at 2540 ("The Confrontation Clause – like [] other constitutional provisions – is binding, and we may not disregard it at our convenience."). The fact that a safeguard guaranteed a criminal defendant is costly or time-consuming does not provide a basis for diminishing that protection.

Moreover, the State's administrative concerns should not be exaggerated. While limiting surrogate experts to the narrow circumstances we have suggested may impose some degree of burden on the prosecution, these burdens will not be so severe, especially given that only a small portion of criminal

cases even go to trial, and only a small portion of those cases require live expert witness testimony.

Indeed, our proposed approach to the issue of surrogate witnesses is an effort to find a principled balance between, on the one hand, the importance of Confrontation, and, on the other hand, the recognition that, because surrogate witnesses testifying about scientific procedures on the basis of a well-documented record can offer meaningful independent judgment, they should be allowed in the narrow circumstances when necessity makes the use of a non-surrogate expert impossible through no fault of either party. *Amici*'s proposed test, if adopted, would therefore mitigate the burdens imposed by the Confrontation Clause in precisely those cases where a total ban on surrogate expert witnesses interpreting testimonial materials would otherwise impose the greatest burdens.

A. Burdens Relating to Forensic Evidence Are and Will Continue To Be Alleviated By Stipulations and Waivers.

Confrontation rights, like many other constitutional rights, can be waived. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). There are several cost-saving mechanisms by which criminal defendants can waive the right to confront a forensic examiner, including stipulations and "notice-and-demand" statutes. As *Melendez-Diaz* recognized, both of these mechanisms preserve defendants' confrontation rights while alleviating the burdens on the government. 129 S. Ct. at 2540, fn.10, 2541.

1. Stipulations

Stipulations, which are used in criminal as well as civil cases, "take a number of forms." CHARLES ALAN

WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5194 (1978) ("WRIGHT & MILLER"). First, "[t]he parties or their counsel can agree that certain facts shall be taken as true for purposes of the litigation." *Id.* Second, the parties may stipulate "to the admission of evidence." Patrick L. McCloskey & Ronald L. Schoenberg, CRIMINAL LAW DESKBOOK (2007). Third, "[t]he agreement can take a less conclusive form, as when it is stipulated that a certain witness, if called, would have testified to particular facts." WRIGHT & MILLER § 5194.

Stipulations are routinely used in criminal cases to establish facts that are necessary to the prosecution's case that the defendant cannot effectively dispute. In particular, they are often used in the context of expert testimony concerning forensic evidence. *See, e.g., United States v. Olivares-Vega*, 495 F.2d 827, 829-30 (2d Cir. 1974) (defendant agreed not to contest "that a laboratory analysis would show that the white powder [found in his luggage] was cocaine"); *United States v. Spann*, 515 F.2d 579, 580 (10th Cir. 1975) (defendant stipulated that, if the government's chemist were called at trial, "he would testify that in his opinion the substance" confiscated "was 'marihuana.'").

Stipulations are so common because they benefit the courts, criminal defendants, and prosecutors alike. From the courts' perspective, stipulations serve the critical purpose of "judicial efficiency." WRIGHT & MILLER § 5194. With trial judges facing heavy workloads, it is hardly surprising that "the general policy of the Civil and Criminal Rules is to encourage [evidentiary] stipulations, thereby saving time and lessening the potential for error." *Id.* Prosecutors often benefit from stipulations, as well.

If the defendant is willing to stipulate a fact that the prosecution would otherwise have to prove, or to testimony that the prosecution would otherwise have needed to offer (including that of a forensic expert), the prosecution is relieved of that burden. For defendants, absent a specific basis in fact for contesting the correctness of an expert's conclusion, there is little to gain and much to lose in requiring an articulate, well-credentialed expert to appear to prove an undisputed technical detail of an alleged crime. *See* Gary Muldoon, *Use of Stipulation in Criminal Cases*, 4 ISSUES IN NEW YORK CRIMINAL LAW No. 10, *available at* http://www.mcacp.org/issue38.htm (last visited November 18, 2010) (noting that, through stipulations, criminal defendants can avoid "a parade of unfavorable witnesses called by the prosecutor," as well as the risk that the jury will "be more impressed with [a] witness's credentials than the subject matter testified to"). Instead, through a stipulation, the defendant may be able to narrow the dispute, and shift the focus of the trial to more realistic sources of reasonable doubt. By doing so, the defendant may enhance his credibility and focus greater attention on the issues that are central to a plausible defense. Various Eds., *Criminal Law Advocacy* (Matthew Bender (now Lexis Publishing)).

Confrontation of forensic science evidence serves a critical function in some criminal trials, but in many others, the defendant has no credible basis—and thus no strategic reason—for challenging facts or conclusions contained in forensic reports. For example, as was perhaps the case in *Spann* and *Olivares-Vega*, there may be no real debate over the identity or quantity of a controlled substance found upon the defendant. The defendant may therefore seek to minimize the impact of those facts, and to

fight on other, more promising battlegrounds. Hence, the defendant might agree to stipulate "the fact that drugs were sold" but contest the charges on the ground of "mistaken identity," insanity, or any number of other defenses. Various Eds., *Criminal Law Advocacy* (Matthew Bender (now Lexis Publishing)). The stipulated fact or testimony may be "totally compatible with [the defendant's] theory of the case." *Id.* Form 2A-3; *see, e.g.*, *State v. Miller*, 790 A.2d 144, 153 (N.J. 2002) (noting that in the "vast majority" of drug cases involving forensic reports, the defendant does not oppose the admission of the laboratory certificate).

Furthermore, our proposed rule will likely *increase* the frequency of stipulations to forensic testimony by the defense. This rule will increase the incentives for careful documentation, as thorough report-writing becomes a requirement for the later use of a surrogate witness should the original analyst prove unavailable. Higher-quality forensic reports will likely decrease the times that the expert need be called to testify at all; if a forensic test inculpates the defendant, and the detailed report suggests no error or omission, it is unlikely to be in the defendant's interest to lend this report additional credibility through live testimony for which effective cross-examination is not available. To be sure, when the detailed report reveals flaws or limitations in the tests that might not have been available without the additional detail, this may spur the defendant to exercise his Confrontation rights – and appropriately so! But when the additional detail reveals no such flaws, it makes still clearer to the defendant the likely lack of benefit to result from cross-examination.

2. Notice-and-Demand Statutes

As *Melendez-Diaz* itself made clear, another mechanism for reducing the potential burden entailed by the presentation of "expert declarants" is utilization of "notice-and-demand" statutes. 129 S. Ct. at 2541. Under these statutes, if the prosecution intends to use forensic evidence at trial in lieu of live testimony from the forensic examiner, the prosecution must serve "notice" to the defense of its intent to rely on such evidence. The defendant then has the opportunity to object to the introduction of the laboratory report as evidence and to "demand" that the prosecution produce the forensic witness at trial. In this way, notice-and-demand statutes create an orderly mechanism by which prosecutors can save time and effort, while also affording the defendant a full, fair opportunity to confront his accusers.

Like stipulations, notice-and-demand statutes benefit prosecutors and defendants alike. Under these statutes, prosecutors must present live testimony from forensic examiners only if defendants timely signal their intent to exercise their confrontation rights at trial. When the defendant elects not to exercise his right, live testimony need not be presented, and the administrative and fiscal burdens on the government evaporate. To be sure, notice-and-demand procedures are more burdensome to defendants than stipulations; a defendant may lose his ability to cross-examine a forensic examiner by failing to satisfy the statutory demand obligations. *See, e.g.*, *Brooks v. Commonwealth*, 638 S.E.2d 131, 138 (Va. Ct. App. 2006) (failure to give demand until the day of trial constituted a valid waiver of confrontation rights); Metzger at 481-84 ("Legislators rely on . . . defen[dants'] failures [to satisfy the demand

requirement] to help prosecutors get cheaper convictions."). The critical point, however, is that the defendant retains the opportunity to exercise his rights under the Confrontation Clause, and to choose when and whether to waive those rights, as the Constitution permits.

Furthermore, in the surrogate expert setting, notice and demand statutes can provide law enforcement officials with advance notice regarding those situations in which it might be necessary to use a surrogate witness, or possibly to re-test. If the defendant does not "demand" the forensic witness, then there is no need to use a surrogate, even when the original analyst is unavailable.

B. Laboratory Procedures Can Be Modified to Reduce the Risk of Exclusion under the Confrontation Clause

If the Court adopts *Amici*'s proposed test and reverses the instant case, the burdens on law enforcement officials could be still further mitigated by an evolution of laboratory procedures. For example, it might be possible to develop procedures for back-up analysts to observe the tests as they were being conducted. While doubling up on analysts or observers might be more inefficient than using a single analyst, it might also enhance quality assurance in the laboratory more generally. In scientific endeavors more generally, the reproducibility of results is held in high regard as a method for enhancing accuracy. (*See, e.g.*, JOHN ZIMAN, RELIABLE KNOWLEDGE: AN EXPLORATION OF THE GROUNDS FOR BELIEF IN SCIENCE 63 (1978) ("[T]he reproducibility of experimental results . . . is their ultimate guarantee of . . . reliability.") Moreover, routine re-testing is already made use of in some forensic domains. In

latent fingerprint identification, for example, a routinely-used quality assurance procedure requires verification of every fingerprint identification by a second examiner. *See* CHRISTOPHE CHAMPOD, ET AL., FINGERPRINTS AND OTHER SKIN RIDGE IMPRESSIONS, 39-40 (2004). While the purpose of this requirement is not connected to the Confrontation Clause, a consequence of it is that every fingerprint match has been personally examined by at least two analysts. If one expert were to become unavailable, the second could testify without running afoul of the Confrontation Clause.

By the same token, law enforcement officials could elect to videotape or otherwise record their forensic examinations for later reference. The cost of videotaping is not high. Indeed, virtually every cellphone now contains video recording capability, and the cost of computerized storage of video recordings of forensic tests would be minimal.

Similarly, laboratories could elect to preserve more samples for re-testing than they do at present in order to assure the availability of the material for re-testing, should it prove necessary. While state laws do vary regarding whether due process requires breath tests samples in DUI cases to be preserved, most states do not require such preservation, nor is it mandated under the Constitution. *See, e.g., California v. Trombetta*, 467 U.S. 479 (1984), and cases described in LAWRENCE TAYLOR, DRUNK DRIVING DEFENSE § 10.03 (2006). In the surrogate expert context, the question becomes one of assessing costs and benefits: If the risk of an unavailable testimonial witness seemed significant enough, laboratories could elect to preserve samples to make re-testing plausible.

We do not mean specifically to recommend the routine use of double analysts, or even greater sample preservation. The point is that laboratories' procedures and designs are capable of evolution as needed. Laboratories can make reasonable and informed decisions regarding the extent of documentation they require; how to structure their analysts' work; whether to videotape forensic examinations; and myriad other issues, in ways that can decrease the risk of having forensic evidence excluded at trial, even if surrogates witnesses are permitted only in the limited circumstances we recommend. Whether these investments are sufficiently valuable for laboratories is an empirical question that we cannot presume to answer. The point is simply that laboratory procedures need not be taken as an unchanging set point, but rather, they can flexibly adapt to constitutional requirements.

CONCLUSION

Amici's proposed test alleviates the burdens of a ban on surrogates in precisely those cases where no other reasonable alternative exists. This test combines with the other mechanisms for making the Confrontation Clause's burdens manageable in the context of forensic science, including stipulations, notice and demand statutes, and the possibility for modifying laboratory procedures. These techniques, coupled with the availability of surrogate experts as a second-best measure in accordance with our recommended test, together provide mechanisms that preserve the core values of the Confrontation Clause in the forensic science arena, while achieving an appropriate balance between practicality and principle.

For the foregoing reasons, as well as those in Petitioner's brief, the judgment below should be reversed.

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DONALD BULLCOMING,
Petitioner,

v.

NEW MEXICO,
Respondent.

On Writ of Certiorari to the New Mexico Supreme Court

BRIEF OF *AMICI CURIAE* PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, ALASKA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, ARKANSAS PUBLIC DEFENDER COMMISSION, ALAMEDA PUBLIC DEFENDER'S OFFICE, COUNTY OF SACRAMENTO OFFICE OF THE PUBLIC DEFENDER, SAN FRANCISCO OFFICE OF THE PUBLIC DEFENDER, AND 20 OTHER DEFENDER ORGANIZATIONS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

A DECISION THAT THE CONFRONTATION CLAUSE REQUIRES THE PROSECUTION TO CALL IN ITS CASE-IN-CHIEF THE AUTHOR OF THE FORENSIC REPORT IT SEEKS TO ADMIT AGAINST THE DEFENDANT WOULD NOT IMPOSE AN UNDUE BURDEN ON OUR CRIMINAL JUSTICE SYSTEM 5

A. Calling The Forensic Analyst And The Author Of The Forensic Report Is Already The Practice In A Diverse Array Of Jurisdictions Across The Country 5

B. Calling The Analyst/Author Is Feasible Because Such Witnesses Only Testify In A Relatively Small Number Of Cases And Systems Are In Place To Alleviate The Burden Of Testifying In Court 15

1. Forensic analysis is only an issue at trial in a small number of cases 16

2. There are mechanisms to minimize the burden of testifying 22

3. Laboratories and the prosecutors do what is necessary to make sure that the analyst is available 23

TABLE OF AUTHORITIES

CASES Page

Briscoe v. Virginia,
130 S. Ct. 1316 (2010) 7

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541 U.S. 36 (2004) 7

Gardner v. United States,
999 A.2d 55 (D.C. 2010) 5

Melendez-Diaz v. Massachusetts,
129 S. Ct. 2527 (2009) 7, 15, 17, 21

Miller v. State,
472 S.E.2d 74 (Ga. 1996) 9

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729 N.E.2d 470 (Ill. 2000) 11

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722 N.W.2d 304 (Minn. 2006) 10

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216 S.W.3d 663 (Mo. 2007) 5

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914 A.2d 1 (D.C. 2006) 7, 11

STATUTES AND RULES

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Ga. Uniform Super. Ct. R. 9.2(C) 22

TABLE OF AUTHORITIES—Continued

	Page
725 ILCS 5/115-15 (1994)	11
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Minn. Stat. § 634.15 (2007)	10
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Va. Code Ann. §19.2-187.1 (2010)	22, 25
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Alaska	
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Arkansas	
Arkansas State Crime Laboratory, http://www.crimelab.arkansas.gov/aboutUs/Pages/default.aspx	13, 23
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Page

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Page

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TABLE OF AUTHORITIES—Continued

Page

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Page

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Page

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Page

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INTEREST OF AMICI [1]

Amici are defender offices and associations from across the country. They include offices and associations of attorneys that provide representation to individuals in criminal cases state-wide: the Alaska Association of Criminal Defense Lawyers, the Arkansas Public Defender Commission, the Connecticut Office of the Chief Public Defender, the Colorado State Public Defender, the Delaware Public Defender, the Maryland Office of the Public Defender, the Michigan State Appellate Defender Office, the Minnesota State Public Defender, the Missouri State Public Defender, the New Jersey Office of the Public Defender, the Virginia Association of Criminal Defense Lawyers, and the Washington Defender Association. They also include offices that provide representation to individuals in criminal cases in particular counties and municipalities: the Public Defender Service for the District of Columbia, the Alameda Public Defender's Office (representing Alameda County, California), the County of Sacramento Office of the Public Defender (representing Sacramento County, California), the San Francisco Office of the Public Defender (representing San Francisco, California), the Solano County Public Defender (representing Solano County, California), the Public Defender, Fifteenth Judicial Circuit of Florida (representing Palm Beach County and handling appeals on behalf of all of the public defenders within the Fourth

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[1] Both parties have filed letters with the Court consenting to the filing of amicus curiae briefs in support of either party or neither party. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

District Court of Appeal, which includes Broward, Palm Beach, Indian River, St. Lucie, Martin and Okeechobee Counties), the Stone Mountain Judicial Circuit Public Defender (representing Dekalb County, Georgia), the Cook County Public Defender (representing Cook County, Illinois), Marion County Public Defender Agency (representing Marion County/ Indianapolis, Indiana), the Orleans Public Defenders (representing Orleans Parish, Louisiana), the Ninth Circuit Public Defender (representing Charleston, South Carolina), the Minnehaha County Public Defender's Office and the Pennington County Public Defender's Office (representing Minnehaha and Pennington Counties, South Dakota, respectively), and the Fairfax County Office of the Public Defender (representing Fairfax County, Virginia).

In amici's jurisdictions, the prosecution routinely relies on forensic analysis to establish the defendant's guilt beyond a reasonable doubt and routinely calls as a witness in its case-in-chief the analyst who drew the conclusions and authored the report containing the incriminating analysis. Amici have an interest in preserving this status quo and ensuring that their clients have the right to confront the actual analyst/ author of the report upon which the prosecution seeks to rely.

SUMMARY OF ARGUMENT

Amici routinely represent clients in cases where state prosecutors, like the New Mexico prosecutor in Mr. Bullcoming's case, rely at trial on reports generated by state and municipal forensic laboratories. What brings this diverse collection of criminal defense lawyers together is the prosecution's practice of calling as a witness in its case-in-chief the analyst

who drew the conclusions and wrote the report. Absent a waiver or stipulation by the defense (and many times even when the defense is willing to stipulate to this evidence, simply because these witnesses have powerful incriminating evidence for the prosecution), the state or municipal analyst/author – the person who assessed the blood alcohol content, or identified the seized controlled substance, or made the DNA or fingerprint comparison – comes to court, testifies for the prosecution, and is subject to confrontation and cross-examination by the defense. Amici are thus in a position to report to the Court that requiring the prosecution to fulfill the confrontation guarantee by requiring the analyst/author to testify will not impose an undue burden on the States. Rather, it is a sustainable cost of prosecution that is already borne in the jurisdictions in which amici practice.

In the diverse array of municipalities and states from which amici hail – from Broward County/Fort Lauderdale, Florida, to Washington D.C., to Rapid City, South Dakota, to Oakland, California; from New Jersey to Missouri to Colorado to Washington State – the criminal justice system continues to function. This reflects the reality that the vast majority of criminal defendants plead guilty. In particular, defendants in Driving Under the Influence and in drug possession and distribution cases, which produce the highest demand for forensic testing, plead guilty in droves. And, in the relatively minuscule percentage of cases that ultimately go to trial, defendants may well not contest the validity of the forensic analysis presented by the prosecution and may consent to its admission without live testimony.

In the small number of remaining cases, amici can report that the prosecution manages to bring to court the forensic analyst, just as it manages to bring to court every other witness with critical incriminating evidence, and the instance of the truly unavailable analyst, a municipal or state employee (or contractor), is exceptional. Courts are highly deferential to the analysts' schedules and liberally grant continuances to accommodate their conflicts. Finally, there are mechanisms to minimize the burden of calling the analyst. For example, prosecutors often place these witnesses on call, try to schedule multiple cases in which testimony is required for the same day, or call these witnesses out of order when they arrive in court to minimize wait time. Accordingly, although the Court has already held that the right to confrontation may not be "relax[ed] . . . to accommodate the necessities of trial and the adversary process," *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009) (internal quotation and citation omitted), the experience of amici in our respective jurisdictions demonstrates that there is no need to do so.

ARGUMENT

A DECISION THAT THE CONFRONTATION CLAUSE REQUIRES THE PROSECUTION TO CALL IN ITS CASE-IN-CHIEF THE AUTHOR OF THE FORENSIC REPORT IT SEEKS TO ADMIT AGAINST THE DEFENDANT WOULD NOT IMPOSE AN UNDUE BURDEN ON OUR CRIMINAL JUSTICE SYSTEM.

A. Calling The Forensic Analyst And The Author of The Forensic Report Is Already The Practice In A Diverse Array Of Jurisdictions Across The Country.

There are a number of cases in which appellate courts around the country have held that surrogate analyst testimony violates a defendant's right to confrontation. *See, e.g., Gardner v. United States*, 999 A.2d 55, 59 (D.C. 2010); *State v. March*, 216 S.W.3d 663, 667 (Mo. 2007). But appellate cases provide an incomplete picture of actual trial practices. When such practices satisfy defendants' confrontation needs and are thus not subject to challenge, it is unlikely there will be an appellate record of that fact. Such is the case with respect to the prosecution's introduction of forensic reports in the jurisdictions in which amici practice.

In all of the jurisdictions in which counsel from the undersigned defender offices and associations practice, when the prosecution seeks to present to the fact-finder at trial a report generated by a state or municipal forensic laboratory, it routinely and reliably calls as a witness in its case-in-chief the analyst who examined the evidence, drew the conclusion, and wrote the report. Amici can report that, absent a waiver of confrontation or stipulation by the defense

to the contents of the report, this is the practice in their jurisdictions in all areas in which forensic analysis is performed by state or municipal forensic laboratories.[2] Thus, when a Driving Under the Influence (DUI)[3] case based on a blood or urine test goes to trial in amici's jurisdictions, the toxicologist employed by the state or municipal lab who signs and issues the report concluding that a defendant was under the influence of drugs or alcohol testifies for the prosecution.[4] Similarly, when a drug possession

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[2] In its 2009 report *Strengthening Forensic Science in the United States: A Path Forward* (2009), the National Research Council discussed the most common areas of forensic inquiry including analysis of controlled substances, biological evidence, friction ridge analysis, other pattern/impression evidence, tool mark and firearms identification, and analysis of hair and fiber evidence. *See* pp. 127-182. Separate from its discussion of the "forensic science disciplines," the NRC also discussed "medico legal death investigation"/"forensic pathology" but distinguished this as a "subspecialty of medicine." *Id.* at 38, 241-68. In this brief, amici do not address confrontation practices in their jurisdictions vis à vis this medical subspecialty.

[3] Such crimes go by different names in different jurisdictions. Amici refers to the category of traffic offenses which prohibit a defendant from driving while impaired due to ingestion of alcohol or drugs, and which typically involve proof that alcohol or drugs were present at a certain level in the defendant's breath, blood, or urine.

[4] Most jurisdictions have locally available technicians for breath tests who do not work in a forensic laboratory. These technicians are often trained police officers and generally far outnumber laboratory staff. For example, according to the website for Connecticut's Department of Public Safety, in 2003, 3,181 instructors and operators in Connecticut completed training in breath alcohol testing. State of Connecticut, Department of Public Safety, Scientific Services, Controlled Substances/ Toxicology Laboratory, http://www.ct.gov/dps/cwp/view.asp?a=2155&Q=294434&dpsNav=|.

or distribution case goes to trial in amici's jurisdictions, the chemist employed by the state or municipal lab who identified the seized substance as an illegal drug and reported that fact testifies for the prosecution. And in a case where the results of DNA, fingerprint, firearms, or handwriting comparisons are introduced into evidence, the analyst or examiner employed by the state or municipal lab who made the comparison takes the stand in the prosecution's case-in-chief.

In the majority of amici's jurisdictions, the routine practice of calling the analyst/author is longstanding, predating this Court's decision in *Melendez-Diaz* or even *Crawford v. Washington*, 541 U.S. 36 (2004). The District of Columbia adopted this practice five years ago, in the wake of *Crawford*. *Thomas v. United States*, 914 A.2d 1 (D.C. 2006). Virginia adopted this practice most recently; by the time this Court vacated the Virginia Supreme Court's decision in *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010), it had changed its practice and had begun calling the actual analyst/author in the prosecution's case-in-chief. *See* Brief for the Public Defender Service for the District of Columbia and National Association of Criminal Defense Lawyers as Amici Curiae Supporting Petitioner, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191), 2009 WL 2896302, *26-27 (detailing steps Virginia legislature had taken to facilitate this practice).

The long history of this practice in the majority of jurisdictions in which amici practice is attributable to several factors:

First, many amici report that the prosecutors in their jurisdictions recognize the analyst for who she is, i.e., an essential source of incriminating evidence

against the defendant, and have simply never engaged in creative tactics to present this witness's findings and conclusions in the witness's absence.

Second, the reality is that the prosecution often wants this expert on the stand at any trial, because – barring any embarrassing impeachment material (such as circumstances that might result in an analyst being placed on unpaid leave) – this is often the prosecution's most powerful witness. As noted on the Washington State Patrol Forensic Laboratory Services website:

> Scientific testimony is often the deciding factor in the judicial resolution of civil and criminal cases. The results of scientific analysis of evidence – blood, semen, shreds of clothing, hair, fibers, glass, paint, soil, bullets or bullet casings, impressions, and other physical indications – left at the scene of a crime can seem more compelling to a jury than the testimony of eyewitnesses.[5]

Thus, in many jurisdictions even before this Court's decision in *Crawford*, the prosecution called the analyst/author to testify to bolster the persuasive power of its case; and it did so regardless of logistical difficulties and on many occasions when the defense would have preferred that the analyst did *not* testify.

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[5] Washington State Patrol Forensic Laboratory Services website: http://www.wsp.wa.gov/forensics/crimlabs.htm. Similarly, the website for the Louisiana State Police Crime lab observes that "[a]nalyses performed at the laboratory are often the definitive factor in proving the guilt or innocence of persons charged with criminal acts," and that "its personnel are available to District Attorneys and City Prosecutors to provide expert testimony in criminal court on their findings." http://www.lsp.org/crimelab.html.

Third, in some jurisdictions, the forensic reports generated by state labs have long been deemed inadmissible hearsay. *See, e.g.*, *Miller v. State*, 472 S.E.2d 74, 80 (Ga. 1996).

Fourth, and relatedly, many jurisdictions in which amici practice have long had notice and demand statutes that render these otherwise hearsay forensic reports admissible while specifically preserving a defendant's right to demand that the prosecution call the author/analyst of a forensic report. Some of these notice and demand statutes specifically acknowledge the defense right to confront the author/analyst of *any* laboratory report upon a timely demand by the defense. Upon such a demand, they explicitly require the prosecution present the testimony of

- the "expert witness" who "performed a test on the substance or object in question," Wash. Super. Ct. Crim. R. 6.13(b) (1976)(1)&(3);
- "the analyst of the laboratory who performed the analysis," Ark. Code Ann. § 12-12-313(d)(2) (1979);
- the "employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification," Colo. Rev. Stat. Ann. § 16-3-309(5) (1984);
- "the person in the State Forensic Laboratory or the certified chemist employed by a law enforcement agency within the state, who conducted the examination [to] testify . . . concerning the examination or analysis," S.D. Codified Laws § 23-3-19.3 (1996);

- "the person signing the report," who must in turn certify that "he or she conducted the tests shown on the report using procedures approved by the bureau and the report accurately reflects his or her opinion regarding the results," Ga. Code. Ann. § 35-3-154.1 (2004); or
- the "person who prepared the blood sample report" and in all other cases, the "person who performed the laboratory analysis or examination," Minn. Stat. § 634.15(2)(a) (2007).[6]

In other states in which amici practice, the notice and demand statutes or rules are specific to drug possession and distribution cases and DUI cases. Thus, upon a timely demand by the defense, the prosecution in these cases in Alaska is required to present the live "testimony of the person signing the report [identifying a controlled substance]," who must in turn be "the person [who] perform[ed] the analysis." Alaska Stat. Ann. § 12.45.084(a) & (d) (1982). The prosecution in Maryland is required to present testimony of the "technician or analyst who performed the [intoxication] test," and for drug identification, "the chemist, analyst, or any person in the chain of custody as a prosecution witness." Md. Code Ann. Cts & Jud. Proc. §§ 10-306, 10-1003 (1973). The prosecution in South Carolina is required to present the testimony "the chemist or analyst who performed the [drug identification] test." S.C. R. Crim. P. 6(a).

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[6] Minnesota's use of a notice and demand system predates this iteration of the statute. An earlier version was invalidated by *State v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006), because it failed to provide the defense with adequate notice of the prosecution's intent to rely on the laboratory report, but contained the same language indicating that the prosecution had an obligation to call as a witness the actual analyst/author.

And in the District of Columbia, the statute that, as written, places the burden on the defense to subpoena "the author of the report" in drug identification testing, has been reinterpreted to require the prosecution to call that witness. *Thomas*, 914 A.2d at 5; D.C. Code § 48-905.06 (1981).[7] These statutes impose an obligation on the defense, in a limited category of cases which generate the highest volume of forensic testing, to make a timely demand to preserve their right to confront the actual analyst/author. But in all other cases where the prosecution seeks to rely at trial on forensic analysis, the actual analyst/author must testify, regardless of a demand.[8]

The jurisdictions in which amici practice are obviously diverse. Geographic size, population size, population density, and topography vary dramatically. For example, Alaska is geographically the

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[7] The District of Columbia also has a statute governing the admissibility of blood, breath and urine tests in DUI cases. As written, D.C. Code § 50-2205.03 (1982) states that a defendant is entitled to the presence of the "technician or police officer who administered the test" upon a timely demand and a showing of good cause, but it has been interpreted post *Thomas* only to require the former.

[8] Illinois used to have a notice and demand statute for cases in which the prosecution sought to rely at trial on reports identifying a controlled substance or identifying drugs or alcohol in a blood or urine sample. 725 ILCS 5/115-15(a) & (c) (1994) (prosecution required, upon a timely demand by the defense, to present the "testimony of the person signing the report," who in turn had to swear that he or she had performed the analysis). The Illinois Supreme Court held this statute unconstitutional in *People v. McClanahan*, 729 N.E.2d 470 (Ill. 2000). Thus, for the past ten years in Illinois, the state has operated without a notice and demand statute for any type of forensic analysis, and the actual analyst/author has testified as a matter of course (absent a stipulation or waiver by the defense).

largest state in the nation – it is approximately one-third the size of the continental United States, but it has one of the smallest populations (in 2009 estimated at 698,743[9]) and large portions of the state have no road system. By contrast, the District of Columbia is contained in a mere 61 square miles with an estimated population of 599,657.[10] Its residents complain of potholes but can reach the courthouse with relative ease by car, bus, subway, or foot. The populations of both Alaska and D.C. are, in turn, dwarfed by Cook County, with an estimated population of 5,287,037,[11] Broward County, with an estimated population of 1,766,476[12] (the second most populous county in Florida after Miami/Dade) and Alameda County with an estimated population of 1,491,482.[13]

As a consequence of this diversity, the demand for services in the jurisdictions in which amici practice vary, as do the resources allocated to meet this demand. As rural areas have lower crime rates and fewer cases in which forensic analysis is an issue, it

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[9] United States Census Bureau, State and County Quick Facts: Alaska, http://quickfacts.census.gov/qfd/states/02000.html.

[10] United States Census Bureau, State and County Quick Facts: District of Columbia, http://quickfacts.census.gov/qfd/states/11000.html.

[11] United States Census Bureau, State and County Quick Facts: Cook County, Illinois, http://quickfacts.census.gov/qfd/states/17/17031.html.

[12] United States Census Bureau, State and County Quick Facts: Broward County, Florida, http://quickfacts.census.gov/qfd/states/12/12011.html.

[13] United States Census Bureau, State and County Quick Facts: Alameda County, California, http://quickfacts.census.gov/qfd/states/06/06001.html.

often does not make sense to have locally available trained analysts on staff to do the analysis required in the rare case in which it is needed; by contrast, higher caseloads in more urban areas create economies of scale.

In light of these demand and resources issues, jurisdictions in which amici practice have chosen to provide forensic analysis services in a variety of different ways and have laboratories that vary greatly in size and structure. Some states like Alaska, Arkansas, Connecticut, Delaware, Florida, Illinois, Indiana, Louisiana, Maryland, Michigan, Minnesota, Missouri, New Jersey, South Dakota, Virginia, and Washington State have centralized laboratory systems with one central lab[14] or regional locations that service large population centers or broader geographic areas.[15] Some populous areas, like

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[14] http://www.dps.state.ak.us/crimelab/;

http://www.crimelab.arkansas.gov/aboutUs/Pages/default.aspx;

http://www.crimelab.arkansas.gov/sectionInfo/Pages/default.aspx;

http://www.ct.gov/dps/cwp/view.asp?a=2155&Q=317116&PM=1;

http://dsp.delaware.gov/crimelab.shtml.

http://doh.sd.gov/Lab/forensic.aspx

[15] http://www.fdle.state.fl.us/Content/Forensics/Menu/Forensics-Info-Home.aspx;

http://dofs.gbi.georgia.gov/00/channel_title/0,2094,75166109_75166180,00.html;

http://www.in.gov/isp/2628.htm;

http://www.isp.state.il.us/Forensics/Forensics.htm (The Illinois State Police laboratory is the largest state forensic laboratory in the United States and the third largest in the world after the FBI and the Forensic Science Service in Great Britain);

Alameda County, Sacramento County, Denver County, Broward County, Palm Beach County, and Marion County/Indianapolis have their own forensic labs.[16] In the District of Columbia, forensic analysis is provided by a mix of local and federal law enforcement entities.[17]

In short, a review of the systems for analyzing forensic evidence in the jurisdictions in which amici

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http://www.lsp.org/crimelab.html; http://www.lsp.org/contact.html;

http://www.msa.md.gov/msa/mdmanual/23dsp/html/23agen.html #forensic; http://www.michigan.gov/msp/0,1607,7-123-1593_3800-15901–,00.html;

http://www.dps.state.mn.us/bca/lab/documents/Lab-Intro.html;

http://www.mshp.dps.missouri.gov/MSHPWeb/DevelopersPages/CLD/laboratoriesIndex.html;

http://www.state.nj.us/njsp/divorg/invest/forensics.html;

http://www.dfs.virginia.gov/labs/index.cfm;

http://www.wsp.wa.gov/forensics/crimlabs.htm.

[16] http://www.alamedacountysheriff.org/CWS/crime_lab.htm;

http://www.sacda.org/divisions/crime%20lab/crime%20lab.php;

http://www.denvergov.org/tabid/367615/tabid/383680/Default.aspx?;

http://sheriff.org/about_bso/dle/units/cl.cfm;

http://www.pbso.org/index.cfm?fa=technicalservices;

http://www.indy.gov/eGov/County/FSA/Pages/home.aspx.

[17] The District of Columbia Metropolitan Police now run the DNA laboratory, and perform all fingerprint and firearms comparisons, but the Mid-Atlantic Laboratory of the United States Drug Enforcement Administration conducts all drug identification analysis.

See http://mpdc.dc.gov/mpdc/cwp/view,a,1232,q, 557833.asp; http://mpdc.dc.gov/mpdc/cwp/view,a,1232,q,540935,mpdcNav_GID,1523,mpdcNav,%7C31417%7C.asp.

practice reveal that no two are the same, and all have their own unique demands and challenges. But all of them manage, and many have done so for years if not decades. Consider again Alaska, where undersigned counsel from the Alaska Association of Criminal Defense Lawyers reports:

> Our state crime lab is in Anchorage. So when I try a homicide case in Sitka, for example, the DNA technician who actually did the DNA testing gets on an airplane and flies to Sitka (roughly 650 miles away). . . . It seems to me that if Alaska, with its geographic, climate, and travel hurdles, presents such testimony through the person who actually did the testing, there really is no good argument why other states cannot do it either.[18]

Certainly the collective experience of this diverse array of jurisdictions is a powerful support for this assertion.

B. Calling The Analyst/Author Is Feasible Because Such Witnesses Only Testify In A Relatively Small Number Of Cases And Systems Are In Place To Alleviate The Burden Of Testifying In Court.

As this Court observed in *Melendez-Diaz*, "perhaps the best indication that the sky will not fall after today's decision is that it has not done so already." *Melendez-Diaz*, 129 S. Ct at 2540. In the jurisdictions in which amici practice, there are a number of reasons why this is so, *i.e.*, reasons why it is feasible for the prosecution to call the actual analyst/author

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[18] Email from Steven Wells to Catharine Easterly, dated November 18, 2010 (on file with PDS).

to testify at any trial about the result of forensic analysis.

1. Forensic analysis is only an issue at trial in a small number of cases.

To begin with, one must consider when the prosecution is relying on the results of forensic analysis. In amici's experience, the largest category of cases is in high volume drug possession, drug distribution, and DUI cases.[19] Outside this sphere, the prosecu-

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[19] Confirmatory data is available from a few state labs. For example, Louisiana State Police Crime Lab website reports that "[a]pproximately 70% of all cases submitted to the lab request analysis for illegal drugs." http://www.lsp.org/crimelab.html. Likewise, the Connecticut Forensic Science Laboratory reports that in 2004, it conducted 5,334 examinations of urine, blood, and breath to determine the presence of drugs or alcohol, and it conducted examinations in 4,084 cases to identify controlled substances; by way of comparison, the forensic biology unit (which identifies biological material) receives approximately 780 cases a year. http://www.ct.gov/dps/cwp/view.asp?a=2155&Q=294434&dpsNav=|; http://www.ct.gov/dps/cwp/view.asp?a=2155&Q=315022&PM=1.

In addition, the Court can extrapolate from conviction and arrest data gathered from the fifty states. According to a Bureau of Justice Statistics Report from 2002, the highest percentage of felons convicted in state courts (32%) were drug offenders (including possession and trafficking), followed by property offenders (30.9%), and then violent offenders, including murder, sexual assault, robbery and aggravated assault (18.8%). Matthew R. Durose and Patrick A. Langan, Ph.D., Felony Sentences in State Courts, 2002, http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc02.pdf). More recent arrest data reflects the same disparity. The Federal Bureau of Investigation's Uniform Crime Reports (UCR) estimated that there were about 1,841,200 state and local arrests for drug abuse violations in the United States in 2007. *See* http://bjs.ojp.usdoj.gov/content/dcf/enforce.cfm# arrests. The highest arrest counts were (in descending order) for (1) "drug abuse violations," 1,841,200 ("defined as state and/or local offenses relating to the unlawful possession, sale,

tion relies on forensic evidence with far less regularity either because no forensic evidence exists (*e.g.*, in a typical simple assault) or the results of forensic analysis are not necessary to the prosecution of the case (*e.g.*, where a robbery suspect is identified by the complaining witness and apprehended while in possession of the complaining witness's wallet).

Within the subset of criminal cases in which the prosecution relies on the results of forensic analysis, it is amici's experience – especially in drug and DUI cases – that the overwhelming number are resolved by a guilty plea, dismissal of the charges, deferred prosecution, or some other disposition short of a trial. *Melendez-Diaz*, 129 S. Ct. at 2540 (noting that "nearly 95% of convictions in state and federal courts are obtained via guilty plea"); Bureau of Justice Statistics Bulletin, Felony Sentences in State Courts, 2002 (Table 9: state court drug offenses disposed of by guilty plea: 96%; state court sexual assault (including rape) charges disposed of by guilty plea: 90%; state court murder charges disposed of by guilty

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use, growing, manufacturing, and making of narcotic drugs including opium or cocaine and their derivatives, marijuana, synthetic narcotics, and dangerous nonnarcotic drugs such as barbiturates"); (2) DUIs, 1,427,500; (3) simple assaults, 1,305,700; and (4) larceny thefts, 1,172,800. *Id.* Similarly, UCR data from 2009 shows that the highest arrest counts were for drug abuse violations (estimated at 1,663,582 arrests) and that arrests for violent crimes (defined to included murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault) were far lower, totaling 581,765. http://www2.fbi.gov/ucr/cius2009/arrests/index.html. Furthermore, a state-by-state breakdown of violent crime arrests from 2009 shows that arrests for robbery and aggravated assault far outnumber arrests for murder, nonnegligent manslaughter and forcible rape. http://www2.fbi.gov/ucr/cius2009/data/table_05.html.

plea: 68%).[20] Indeed, the existence of forensic analysis is itself a great motivator to plead guilty.

Data about the disposition of drug and DUI cases in amici's jurisdictions is confirmatory:

- In Michigan in 2009, out of 62,829 DUI cases, at least 57,768 (92%) were disposed of without a trial in District Court.[21] An additional 3,289 cases of the 62,829 were bindover/transfer cases, which presumably were disposed of in Circuit Court, where the rate of disposition without trial is also extremely high.[22]
- In South Dakota, in 2009, out of 10,147 DUI cases, 10,068 (99.3%) were disposed of without trial.[23]

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[20] Available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc02.pdf. Recent data for dispositions in the District of Columbia and Alaska are consistent. In the District of Columbia, out of 28,148 criminal cases in D.C. Superior Court in 2009, 26,652 (94.7%) cases were disposed of without a trial. District of Columbia Courts Statistical Summary 2009, http://www.dccourts.gov/dccourts/docs/DCC2009AnnualReport-StatisticalSummary.pdf. In Alaska in 2009, 99.4% of misdemeanor cases and 97.3% of felonies were disposed of without trial. http://www.courts.alaska.gov/reports/annualrep-fy09.pdf at 43, 101.

[21] Michigan Supreme Court, 2009 Annual Report, District Court Statistical Supplement, http://courts.michigan.gov/scao/resources/publications/statistics/2009/districtcaseloadreport2009.pdf.

[22] Michigan Supreme Court, 2009 Annual Report, Circuit Court Statistical Supplement, http://courts.michigan.gov/scao/resources/publications/statistics/2009/circuitcaseloadreport2009.pdf.

[23] http://www.sdjudicial.com/Uploads/downloads/ar/fy2009/crcd.pdf at p. 45 (showing 79 convictions or acquittals resulting from trial). South Dakota not only has a notice and demand statute that specifically acknowledges the prosecution's obliga-

- In Washington State in 2009, out of 9,789 felony drug cases, 9,307 (95%) were disposed of without any sort of trial.[24]
- In Palm Beach County, Florida, from June 2008 to June 2009, out of 4,305 felony drug offenses, 4,275 (99%) were disposed of without a trial; out of 25,430 misdemeanors (which include misdemeanor marijuana possession as well as other minor offenses such as battery and trespassing) 25,218 (99%) were disposed of without a trial; and out of 2,724 DUI cases, 2,465 (90%) were disposed of without a trial.[25]

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tion to present the testimony of the actual/analyst author, it also permits the collection of bodily fluids without consent when an officer suspects a person is driving under the influence. S.D. Codified Laws § 32-23-10 (2006). It is amici's experience in Pennington and Minnehaha Counties that law enforcement routinely collects a blood sample.

[24] *See* State of Washington Superior Court Annual Caseload reports, Cases Filed by Type of Case, http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=criminal&fileID=crmfilyr (showing 9,789 cases involving controlled substances filed); Criminal Trial Proceedings by Category of Most Serious Charge at Time of Proceeding, http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=criminal&fileID=crmtrlyr (showing 482 criminal trial proceedings for controlled substance offenses including trial by affidavit and stipulated trials).

[25] http://trialstats.flcourts.org/TrialCourtStats.aspx (search "Circuit Criminal Defendants," "County Criminal Defendants" and "Traffic" for Palm Beach County from June 2008 to 2009). Data is similar for Broward County, Florida. From June 2008 to June 2009, out of 7,194 felony drug offenses, 7,101 (98%) were disposed of without a trial; out of 27,461 misdemeanors, 27,153 (99%) were disposed of without a trial; and out of 4,389 DUI cases, 4,284 (98%) were disposed of without a trial. *Id.* (search

- In Orleans Parish, Louisiana, in 2009, out of 480 cases in the category that includes DUIs, only one was resolved with a trial.[26]
- In Dekalb County, Georgia, from January 1, 2010 to November 22, 2010, the Stone Mountain Public Defender's office closed out 940 felony drug cases and 142 misdemeanor drug cases without any jury or bench trials; it closed out 454 DUI and other misdemeanor traffic cases and had only 9 jury trials and no bench trials.[27]

Finally, even when cases in which forensic analysis has been conducted go to trial, challenging the forensic analysis may not be the focus of the defense case. Amici can confirm that, in the jurisdictions in which they practice, defendants who exercise their right to go to trial stipulate (when asked) regularly, if not frequently, to the admission of forensic analysis. Certainly this is true in drug possession and distribution cases, where the defense is often that the

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"Circuit Criminal Defendants," "County Criminal Defendants" and "Traffic" for Broward County from June 2008 to 2009).

[26] Louisiana Public Defender Board, District Defender Reports, 41st Judicial District Report 2009, http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2009/District%2041.pdf at 639.

[27] In the last five years, from January 1, 2005 to November 22, 2010, the Stone Mountain Public Defender's office closed out 7,556 felony drug cases and 948 misdemeanor drug cases and had only 12 jury trials and 3 bench trials; it closed out 3,286 DUI and other misdemeanor traffic cases and had 82 jury trials and 5 bench trials. Closed cases include those in which the defendant subsequently elected to represent himself or to obtain other counsel, but such cases represent a very small percentage of the whole. This data is on file with the Stone Mountain Public Defender Office.

drugs did not belong to the defendant and that the defendant was misidentified as the person who possessed or was selling the drugs. *See* Brief of Petitioner-Appellant, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191), 2009 WL 2861541, *33 n. 13 (survey of 125 Michigan drug cases that went to trial: analyst testified in 50 (40%); no data indicating in how many instances the prosecution had requested that the defense stipulate to the forensic report). But there are a myriad of other scenarios where the defense is "unlikely . . . [to] insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." *Melendez-Diaz*, 129 S. Ct. at 2542.

Thus, even when the defense is routinely and reliably guaranteed the opportunity to cross-examine the analyst/author of a forensic report, as the defense is in the jurisdictions in which amici practice, that opportunity is frequently forgone, and as a result, analysts testify in only a very small percentage of cases. Data from the Michigan State Police confirm this and demonstrate how the universe of cases in which forensic tests are performed are winnowed to a much smaller number in which testimony of a forensic analysis is presented: In 2006, the state police conducted forensic analysis in 108,701 cases, but they only provided expert testimony (either at the behest of the prosecution or the defense) in 805 cases – 0.7%.[28]

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[28] Website of Michigan State Police, Forensic Science Division, http://www.michigan.gov/msp/0,1607,7-123-1593_3800-15901--,00.html.

2. There are mechanisms to minimize the burden of testifying.

When forensic analysts testify, there are mechanisms to minimize the burden of time and travel. In the District of Columbia, Sacramento County, and Fairfax County, for example, where analysts are close by, analysts are often placed on call so that they can come to the courthouse just before their testimony is needed and thereby minimize any wait time.[29]

If an analyst has to travel a significant distance to get to the courthouse, witnesses can also be interrupted or taken out of order, thereby allowing the analyst to testify as soon as (or soon after) she arrives. To reduce travel costs, prosecutors can also make efforts to schedule for the same day multiple cases in which a particular analyst drew the conclusions and wrote a report upon which the prosecution seeks to rely. Testimony via video conferencing may also be an option with the consent of the defense. *See, e.g.*, Ga. Uniform Super. Ct. R. 9.2(C); Va. Code Ann. §19.2-187.1(B1) (2010).

In short, in amici's experience, there are a variety of means to reduce the time and travel costs of live witness testimony. And to the best of their ability, defense counsel work with the prosecution to facilitate the testimony of their witnesses so that the prosecution will afford the defense the same courtesy in return.

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[29] Allowing prosecutors to place witnesses on call and to represent that a witness is available if needed much reduces the defense's opportunity to strategically demand the presence of the analyst simply to burden the prosecution. Notice and demand statutes, *see* pp. 9-11 *supra*, have the same effect.

3. Laboratories and the prosecutors do what is necessary to make sure that the analyst is available.

No one would argue that the prosecution should be relieved of its burden of calling its police investigators as witnesses in its case-in-chief because the police need to be out on the street fighting crime and investigating cases. It is accepted that it is part of a police officer's job to serve as a witness for the prosecution when cases are tried. The same reasoning applies to forensic analysts who test materials to determine if they can be used as evidence in potential criminal prosecutions. When those cases go forward, it is the job of these analysts to testify in court for the prosecution about their test results.

The state and municipal laboratories in the jurisdictions in which amici practice accept this and make operational and staffing decisions accordingly. Indeed, many of the laboratories expressly include their work in court in the public descriptions of what they do. In Connecticut, the Department of Public Safety explains that its "services" include "[t]he scientific examination and analysis of evidentiary material, and, [t]estimony concerning the analysis of evidentiary material, and interpretation of technical data and laboratory findings."[30] In its mission statement, the Arkansas State Crime Laboratory commits "[t]o provid[ing] relevant, professional and impartial testimony in judicial proceedings."[31] And in Illinois, the State Police explain that "[d]aily crime laboratory

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[30] http://www.ct.gov/dps/cwp/view.asp?a=2155&Q=294434&dpsNav=|.

[31] http://www.crimelab.arkansas.gov/aboutUs/Pages/default.aspx.

work takes place to establish the scientific truth about evidence for court," and that one of their aims is to "communicate well with one another so they will be able to testify clearly and withstand challenge in court."[32] Accordingly, testifying is not characterized as imposing on analysts an additional demand separable from their case work. For example, the Florida Department of Law Enforcement states that "[c]rime lab analysts are called on a continual basis to provide expert witness testimony in court cases,"[33] and in Washington State, the State Police explain that "[t]oxicologists accession [sic] samples in rotation and spend an average of two days a week testifying in court as experts on alcohol, drugs, and their effects."[34]

Witness availability is of course an issue, but no more so for a forensic analyst than any police officer witness, and in amici's experience far less than for eyewitnesses to street crimes. Because testifying is accepted as part of an analyst's job, it is amici's

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[32] http://www.isp.state.il.us/Forensics/Special.htm;

see also http://www.michigan.gov/msp/0,1607,7-123-1593_ 3800-15901--,00.html (Michigan State Police explain that "[d]ivision employees also appear in court to provide expert testimony regarding the evidence and analytical procedures used");
http://www.dps.state.mn.us/bca/lab/documents/Lab-Intro.html) (The Minnesota Department of Public Safety explains that "[l]ab scientists provide expert testimony in court regarding their examinations and provide specialized training to law enforcement officers");
http://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CLD/DrugChemistry/drugChemistry.html (the Missouri State Highway Patrol explains that "as an expert witness, the analyst presents his or her findings in a court of law").

[33] http://www.fdle.state.fl.us/Content/Forensics/Menu/Forensics-Info-Home.aspx.

[34] http://www.wsp.wa.gov/forensics/flsbhome.htm#toxicol.

experience that appropriate arrangements are made when an analyst is temporarily unavailable. Prosecutors have access to the analysts' schedules and can schedule trial dates accordingly (again, notice and demand statutes facilitate this). When unexpected conflicts arise, prosecutors seek continuances. In amici's experience, trial courts are sympathetic on such occasions and liberally grant these requests. However, to the extent that state legislatures feel that the trial courts are insufficiently accommodating, they can follow Virginia's example and mandate that a continuance be granted. *See* Va. Code Ann. § 19.2-187.1(C) (2009) (when a forensic analyst "is not available for hearing or trial and the attorney for the Commonwealth has used due diligence to secure the presence of the person, the court shall order a continuance").

Likewise, in the rare case when an analyst/author has left the employ of the state or municipal lab in the (often brief) interim between conducting the analysis for a case and any trial, it is amici's experience that the prosecution makes the effort to bring that analyst, who is still easier to locate than many eyewitnesses to street crimes, to court. Thus amici have had cases where the prosecution has flown an analyst back to the jurisdiction to testify or placed an analyst under subpoena. Finally, amici have seen cases where, when necessary, the laboratory retested and/or reanalyzed the available evidence. This is almost always an option in drug possession, drug distribution, and DUI cases, and is increasingly an option in cases where DNA analysis is at issue. (Firearms evidence and latent fingerprints can be re-analyzed an infinite number of times.)

In sum, any concern about the absent analyst cannot be the tail that wags the dog for this Court's interpretation of the confrontation guarantee when results of forensic analysis are presented at a trial and the presence of the analyst has not been waived.

* * *

Amici's experience demonstrates that requiring the prosecution to call the actual analyst/author to testify in the prosecution's case-in-chief is feasible and a cost of prosecution that can be borne for a number of practical and rational reasons. For this reason and for all the reasons set forth in the Petitioner's brief, amici respectfully request that the judgment of the New Mexico Supreme Court be reversed.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

No. 09-10876

In The
Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

NEW MEXICO,

Respondent

On Writ Of Certiorari To The New Mexico Supreme Court

BRIEF OF THE *AMICUS CURIAE* STATE OF NEW MEXICO DEPARTMENT OF HEALTH SCIENTIFIC LABORATORY DIVISION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether admission into evidence of a form reporting a defendant's blood sample analysis result violated the Confrontation Clause when the machine's result can be verified with the machine's print-outs, and the defendant had the opportunity to cross-examine a qualified analyst about related issues such as the machine's operation, its analysis of the defendant's blood sample, analyst training, and the laboratory's standard operating procedures, and could have re-tested his blood sample at state expense.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE GAS CHROMATOGRAPH IS, INDEED, A WONDERFUL MACHINE	8
A. The Type of Gas Chromatograph and Associated Equipment Used At SLD Is More Advanced, and Eliminates Confrontation Clause Concerns	12
B. SLD's Standard Operating Procedures Likewise Eliminate Concerns About Analysts' Techniques and Are Readily Verified by the Analysis Generated by the Gas Chromatograph	15
II. ENORMITY OF NUMBERS AND ANONYMITY OF BAC TESTING ELIMINATE THE EFFICACY OR NECESSITY OF HAVING A PARTICULAR ANALYST TESTIFY	26
III. PUBLIC POLICY CONSIDERATIONS MANDATE THAT ANY QUALIFIED ANALYST BE PERMITTED TO TESTIFY REGARDING THE GC'S BLOOD SAMPLE ANALYSIS	30

TABLE OF CONTENTS – Continued

Page

IV. SLD'S 705 FORM STATEMENTS ARE READILY VERIFIABLE, SO THE ONLY ISSUE SHOULD BE THE WEIGHT OF THE FORM'S EVIDENTIARY VALUE, NOT ITS ADMISSIBILITY 33

CONCLUSION 37

APPENDIX

Appendix A – Effect of Sodium Chloride on Headspace Blood Alcohol Analysis by GC-FID ..... App. 1

Appendix B – Toxicology Bureau – Technical Procedures, Implied Consent Worksheet Entry ..... App. 3

Appendix C – Quantitation Report ..... App. 5

Appendix D – Quantitation Report with graphs ..... App. 6

Appendix E – Toxicology Bureau – Technical Procedures Example Worksheet for IC blood alcohol analysis ..... App. 8

TABLE OF AUTHORITIES

Page

CASES

California v. Green, 399 U.S. 149 (1970) 36

Crawford v. Washington, 541 U.S. 36 (2004).....29, 33

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Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009).....*passim*

State v. Bullcoming, 2010-NMSC-7, 147 N.M. 487, 226 P.3d 1 .....6, 30, 34

State v. Dedman, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628 (2004) 11

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TABLE OF AUTHORITIES – Continued

Page

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Page

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New Mexico State Personnel Office, *Suspension of Executive Hiring – Guidelines*, Nov. 8, 2010, *available at* http://www.spo.state.nm.us/NMState_Documents/Memorandum_docs/sushiring_guide_110810 3

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UC-Irvine Pathology Services description of specimen collection tubes, *available at* http://www.pathology.uci.edu/PathologyServicesManual/SpecTubesContainers.html 18

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The State of New Mexico Department of Health, Scientific Laboratory Division ("SLD"), is responsible for laboratory certification, breath alcohol testing instruments and instrument operators, and the methods of taking and analyzing samples for blood and breath testing for alcohol or other chemical substances, or both, under the New Mexico Implied Consent Act. N.M. Stat. Ann. §66-8-107 (2010); N.M. Admin. Code §7.33.2.2. SLD is the primary laboratory testing blood samples for alcohol and drugs for the entire state. It also tests biological samples for the New Mexico Office of Medical Investigator (OMI).

SLD is one of only 26 toxicological laboratories nationwide certified by the American Board of Forensic Toxicology ("ABFT"). ABFT Accredited Laboratories, *available at* http://www.abft.org/index.php?option=com_content&view=article&id=55&Itemid=64. Accreditation is based upon compliance with professional standards, which is assessed by peer review, annual inspections including random checks of sample files,

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[1] Pursuant to Rule 37.6, *amicus'* counsel of record states that she authored this brief in its entirety, and no person, other than the New Mexico Department of Health ("DOH"), made a monetary contribution to the preparation of this brief. DOH felt compelled to offer this brief on behalf of SLD because the impact of this decision will fall so squarely upon it, and no other person or any party would offer the same information or have the same interest as SLD. Both parties gave consent to the filing of any and all *amicus* briefs.

and successful achievement in proficiency testing. *Id.* The Innocence Network, Petitioner's *Amicus*, notes that "[b]ecause most states do not require that labs be accredited, labs face little pressure to standardize their protocols or ensure that individual analysts are conducting tests properly." Br., p.12. As an accredited lab, SLD does face those pressures.

SLD is independent of any law enforcement agency. Instead, it is part of the New Mexico Department of Health. It receives no funding from law enforcement for its testing. Like all New Mexico's state agencies, it is legally required to assist law enforcement without charging fees for its work "relating to or that would aid in controlling crime. . . ." N.M. Stat. Ann. §29-3-4 (2010). Without that proviso, it would undoubtedly charge for its services.

SLD tests thousands of blood samples for drugs, including alcohol, in driving while intoxicated (DWI) and driving under the influence of drug(s) (DUID) cases. From 2008 to 2010, test-related subpoenas requiring analysts to testify in DWI/DUID cases increased by 71%. New Mexico Department of Health Scientific Laboratory Division, *SLD Fall/Winter Newsletter*, 2 ed. (2010), http://www.sld.state.nm.us/documents/sldfallwinter2010newsletter.pdf. ("SLD Fall/Winter 2010 Newsletter"), p.2.

In 2010, SLD received approximately 1600 subpoenas requiring testimony, averaging eight or nine for each work day in the year. *Id.* The number of blood samples received for testing related to DWI/

DUID arrests increased 15% between 2008 and 2010. *Id.* At the same time, the number of analysts available to testify has fallen from five to four analysts for alcohol, and those testing or reviewing tests for drugs has fallen from ten to six analysts. *Cf., id.* Unfortunately, New Mexico is among those states suffering from catastrophic budget difficulties which have made hiring replacement analysts impossible due to a state hiring freeze. New Mexico State Personnel Office, *Suspension of Executive Hiring,* Nov. 8, 2010, *available at* http://www.spo.state.nm.us/NMState_Documents/Memorandum_docs/sus_hiring_110810; and New Mexico State Personnel Office, *Suspension of Executive Hiring – Guidelines,* Nov. 8, 2010, *available at* http://www.spo.state.nm.us/NMState_Documents/Memorandum_docs/sushiring_guide_110810. Adding to its dilemma is the fact that New Mexico is the fifth largest state in the union geographically, covering 121,593 square miles. City-Data.com, *New Mexico – Location, size, and extent, available at* http://www.city-data.com/states/New-Mexico-Location-size-and-extent.html. Historically, it has had one of the most serious DWI problems in the country. New Mexico Department of Transportation, *stopdwinm.com, available at* http://www.nmshtd.state.nm.us/stopdwi/PressRelease/PressRelease_dwi_10-16-09.pdf.

Every blood sample in DWI/DUID cases is tested for alcohol by SLD's Toxicology Bureau. Where the result is under .08 blood alcohol concentration ("BAC"), the blood is tested further for evidence of other drugs because it is presumed that the arresting officer observed evidence of impairment that is not

explained by the alcohol result. New Mexico Department of Health Scientific Laboratory Division, *SLD Fall/Winter 2008 Newsletter, Inaugural Newsletter, available at* http://www.sld.state.nm.us/documents/sldfallwinter2008newsletter.pdf. Overall, 8 to 10% of all blood samples which are tested show low or no evidence of either alcohol or drugs. *SLD Fall/Winter 2010 Newsletter*, p.2.

Each blood sample has original testing work by one, or as many as seven, analysts depending upon whether it is tested only for alcohol or additionally for drugs. *Id.* Then, each analysis is reviewed by a technical reviewer, and finally by an administrative reviewer (who may have also been the technical reviewer in some less complicated cases, generally involving only alcohol). At minimum, at least two analysts will work on or review a sample's analysis, as was true in Mr. Bullcoming's case. JA 58 & 62. One analyst did the original testing which showed a BAC of .21 (well over the *per se* impaired legal limit of .08), and his supervisor reviewed it. Unfortunately, the original analyst, Mr. Curtis Caylor, was on unpaid leave at the time of the trial. JA 58. Mr. Gerasimos Razatos, another SLD analyst, testified at Mr. Bullcoming's trial. JA 48.

Mr. Bullcoming's counsel made a Confrontation Clause objection to admission of the SLD 705 form[2]

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[2] SLD 705 refers to the form's identification at the bottom. JA 62.

(JA 45) completed in part by Curtis Caylor. JA 62. The form stated the BAC results. *Id.* However, his counsel also stipulated that Mr. Bullcoming was drunk. JA 60. Bullcoming's defense related to *when* he got drunk, before or after the truck he was driving rear-ended another vehicle. *Id.* The jury evidently did not believe that it was after the accident, and Mr. Bullcoming was convicted, for the fifth time, of DWI. JA 29.

Since the decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), and prior to the New Mexico Supreme Court's decision in Mr. Bullcoming's case, the responses to *Melendez-Diaz* by District Attorneys' offices across New Mexico ranged from subpoenaing every analyst with any connection to a blood sample, to just some of the potential witnesses, to only subpoenaing a reviewer on the case, to allowing any analyst to testify. The responses of magistrate, municipal or district courts likewise varied wildly, from dismissing cases where not all associated analysts were able to appear, to permitting any analyst to testify about DWI analysis. The result for SLD, where it is subject to a far greater number of subpoenas, and has fewer analysts than ever before, has been chaotic. This Court's decision here has the potential to clarify and provide guidance that will affect labs like SLD nationwide, and more to the point, will significantly impact SLD and its ability to perform the duties it is mandated by law to perform.

SUMMARY OF ARGUMENT

SLD firmly believes the New Mexico Supreme Court properly interpreted the Court's opinion in *Melendez-Diaz, supra* in this case. SLD does not quibble with the decision in *Melendez-Diaz* on Confrontation Clause grounds because no analyst at all testified in that case. An affidavit, standing alone with no competent witness available to question regarding its content, is constitutionally problematic.

Applying *Melendez-Diaz* in its carefully considered opinion, the New Mexico Supreme Court agreed with the defense that the 705 form could not be admitted as a business record. *State v. Bullcoming*, 2010-NMSC-7, 16, 147 N.M. 487, 494, 226 P.3d 1, 8. JA 11. But it also ruled that Bullcoming had ample opportunity to cross-examine the witness against him at trial, a witness who was fully apprised of the facts adduced by the gas chromatograph (GC) machine. JA 14. As will be discussed *infra*, it was the machine that computed the results showing that the Petitioner was seriously intoxicated at the time his blood sample was taken. The original GC operator simply transcribed the results reached by the machine onto a form. JA 13. SLD's witness at Mr. Bullcoming's trial was speaking, not on behalf of the analyst that wrote the BAC on the 705 form, but for the machine that performed the analysis. *Id.* An expert with respect to the GC, and SLD's standard operating procedures (SOPs) that delineate its analysts' work, the SLD witness was fully qualified to be questioned about the machine's results. JA 14.

The State of New Mexico's public policy against driving while impaired by alcohol or drugs was made clear by its adoption of the Implied Consent Act. The Petitioner's claim that only the original analyst may testify about a valid GC analysis thwarts the state's strong interest in roadway safety when each case has at least one, and as many as seven, original analysts. If any analyst is unavailable for any reason, valid test results will become inadmissible. An analyst leaving a laboratory's employ, and beyond court power, may cause many DWI cases to be dismissed, and allow multiple-time offenders like Mr. Bullcoming back behind the wheel. The Confrontation Clause does not require a result that yields no legally cognizable value to a defendant, and is likely to cause great harm to a state.

His counsel admitted Mr. Bullcoming was drunk. He just objected to admissibility of the 705 form that reported his BAC. The form's content is readily verified so, at most, any challenge must go to its evidentiary weight, not its admissibility. The testifying analyst was effectively a second reviewer to the results in Mr. Bullcoming's case. As such, his participation satisfied Confrontation Clause requirements because his opinion was based on facts or data of the type reasonably relied upon by experts in his field: the GC machine's analysis of Mr. Bullcoming's blood.

ARGUMENT

I. THE GAS CHROMATOGRAPH IS, INDEED, A WONDERFUL MACHINE.

In preparing to write this brief, SLD was concerned that the Court would lack important information regarding GCs, which SLD would need to describe in exhaustive detail. Upon review of the briefs filed on behalf of the defense, SLD is happy to report that other *amici* have provided significant information with which SLD does not disagree, at least as to the *general* GC process.

What SLD does feel necessary to bring to the Court's attention, and will discuss in greater detail *infra*, is that the specific information provided, particularly with regard to the brief filed by the National Association of Criminal Defense Lawyers, *et al.* ("NACDL"), either relates to a type of machine not used by SLD, or to a style of machine that was popular 20 or more years ago. Technological advances have changed laboratory landscapes nationwide. Today, SLD uses far more advanced instruments that eliminate the work which the NACDL and other *amici* characterize as "subjective," and likewise eliminates the associated concerns raised by them.

If one ignores the defects due to references to GC machines not used by SLD, the NACDL brief does offer a comprehensive, nearly ten page overview of the "GC process." SLD believes that process may also succinctly be described as follows, beginning at JA 53

[SLD notes for the Court's benefit are italicized, in brackets]:

> The SLD analyst removes:
>
> " . . . two aliquots [of small amounts] – two samples of the blood, two hundred microliters, so you're looking at point two mils, a very small amount that we use of the blood. We put it in a vial with an internal standard, which is used for the ..ctual testing, as the identifying marks. We cap the sample in this particular vial, and put it on the instruments [*sic*] [141] for analysis."
>
> Q Okay. Now, what – what instru – what type of vials are we putting it [*the blood and internal standard*] in?
>
> A Little glass vials, about twenty mils.
>
> Q Okay. And, how do you cap them?
>
> A We have a Teflon septum [*looks like a thin rubbery cover*] and, then, we crimp them with an aluminum top [*i.e., a bottle cap*].
>
> Q Okay. And, what machine do you place them in?
>
> A We use a head space gas chromatograph with an auto[*matic*]sampler.
>
> Q Okay. Now, in layman's terms, would you please tell the jury what that means?
>
> A A gas chromatograph is an instrument – it's about the size of a microwave – and, what we're doing is, we're taking air space right

above this particular sample, and shooting it into this microwave-size instrument. Within it, we have two columns. These particular columns have a sticky nature to them. As the compounds are traveling through them, being pushed by air, it'll latch on to a particular – it will allow a particular compound to go according to size. So the smaller compounds come through first. Then the bigger ones, and progressively. So, it's a timed type of procedure. And, on the other end of this column, within the gas chromatograph, we have the detectors, which actually detect the compounds, and the computer notifies us which [142] compounds those are.

Q Okay. And does the machine itself indicate what the results are?

A Yes.

* * *

Q Once the – once the material is prepared and placed in the machine, you don't need any particular expertise to record the results, do you?

A No.

Q I mean, any human being could look and write and just record the results?

A Correct.

JA 53-54 & 56.

In other words, the blood is mixed with an internal standard, put in a vial suitable for the GC

machine, the vial's capped, put in the machine, and the machine does the rest. According to Mr. Razatos, the SLD analyst who testified under oath [JA 48] at the Bullcoming trial, any human being could read the result and write it on the form.

What seems noteworthy to SLD, since it was created long before the decision in *Melendez-Diaz*, is that this record is remarkably complete as to whether the work is intensive, subjective, readily influenced by the analyst, or anything more than letting the machine do its work. At the time this record was created, the New Mexico courts were following precedent that permitted the SLD 705 form, which states BAC test results, to be entered into evidence as a business record. JA 44-45 & 62-65. *State v. Dedman*, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628 (2004), which established that rule, was quite correctly overruled by the New Mexico Supreme Court in the instant case after applying *Melendez-Diaz*. The analyst testifying at trial had no idea that *Dedman* would be overruled, and was really only stating what he knew to be true about the process. He had no idea that his testimony would someday be reviewed applying a different standard. Essentially, he said he was speaking on behalf of a machine that did virtually all the work.

A. The Type of Gas Chromatograph and Associated Equipment Used At SLD Is More Advanced, and Eliminates Confrontation Clause Concerns.

As noted earlier, the brief filed by the NACDL *amici* references a multitude of concerns generally involving antiquated or unrelated machines and equipment. A brief review of the technical references used by the NACDL *amici* to substantiate their claims that the process is easily manipulated and subjective, where they cite a reference, reveals that those references were published in 1962, 1969, 1971, 1973, 1982, 1984, 1988 to no later than 1989. One cannot help but note that, generally, technological advances made even since 1989 have been tremendous (the Internet was not widely used then, the biggest law firms were just beginning to adapt to the PC age from giant word processing centers and typewriters, and cell phones were roughly the size of a brick), not to mention the changes that have taken place since 1962.

Happily, SLD has kept pace. The machine used at SLD is a Dual Column Capillary Headspace Gas Chromatograph with an autosampler. Gerasimos Razatos, BS; Curtis Caylor, BS; Ruth Luthi, BS; Sarah Kerrigan, Ph.D., *Validation of Volatile Analysis Using Dual Column Capillary GC*. 56th Annual Meeting of the American Academy of Forensic Sciences, Dallas, TX, February 2004, *synopsis available at* http://www.aafs.org/sites/default/files/pdf/dallas04.pdf, pp.347-348. This is the same instrument that was used to test Mr. Bullcoming's blood. JA 54.

There are two types of GC sampling methods: direct injection, in which a needle is injected into the blood in the vial, and indirect injection, in which the needle is injected into the "headspace" above the blood inside a vial. In the latter method the alcohol in the blood, which has been heated to 65 degrees centigrade, becomes a gas, and is thus sampled indirectly. *Accord,* NACDL Br., pp.18-19. The needle never touches the blood in indirect injection GC. SLD uses the indirect headspace method. *Validation of Volatile Analysis Using Dual Column Capillary GC, supra.*

Unfortunately, when discussing the GC, much of the NACDL brief discusses both direct injection and indirect injection GC, so issues which seem plausible are raised, but are not applicable. For example, there is concern that there could be contaminants in the instrument, with care to be taken in cleaning the syringe between injections. NACDL Br., p.19. This applies, however, to direct injection GC, which SLD does not use.

Much of the other information presented is likewise inapplicable. *Amici* refer to variations in amounts of salt which may be used to "force extra ethanol and internal standard into the headspace gas" which they believe can lead to invalid results. NACDL Br., p.18. SLD personnel have presented the results of their experiments regarding salt use, and concluded that the tests results were not statistically different during routine forensic analysis. Yazzie, J., Luthi, R., and Kerrigan, S., *Effects of Sodium Chloride on Headspace Blood Alcohol Analysis*

by GC-FID, Abstracts of FBI/Society of Forensic Toxicology/International Association of Forensic Toxicologists Joint Annual Meeting, Washington, DC, September 2004, Abstract A27, attached as Appendix A, at App. 1-2. Consequently, SLD does not use salt.

Much is also made of the difficulty of consistent and precise pipetting. The process is described as using something like a small turkey baster to suck blood out of the original test tube, and transfer it to a GC test vial. NACDL Br., p.14. The authors do acknowledge, in a footnote, that "[t]oday's pipettes are more sophisticated than turkey basters, and contain dials to specify the desired amount of liquid to be pipetted." That is correct. SLD uses a digital "Hamilton Auto Diluter ML503220 ML503A, non-programmable, 220V dual syringe diluter" which precisely measures the correct amount of internal standard and blood to be simultaneously extracted from their containers and squirted into the GC vial. It is specifically designated as appropriate for use in blood alcohol analysis. *See,* Hamilton Company product information, *available at* http://www.hamiltoncompany.com/products/diluters/c/246. The auto diluter measures the same way every time, and is never used for another process. The digital dials are precisely set for a specific amount, so generally in BAC cases every analyst extracts exactly 2 milliliters (mL) of internal standard to 200 micro liters (uL) of blood. *Cf.*, JA 53. There is no good or bad pipetting technique; the machine does the pipetting for you. Short of squirting the contents onto the floor instead of into the vial,

there is little you can do to impair its performance of the pipetting job.

B. SLD's Standard Operating Procedures Likewise Eliminate Concerns About Analysts' Techniques and Are Readily Verified by the Analysis Generated by the Gas Chromatograph.

Petitioner's various *amici* also make much of the potential for facts or variations in analyst techniques which they say cannot be discovered without the original analyst's testimony. But, at least at SLD, there is no toleration for individualized approaches to BAC testing. Everything must be reported. The analyst must note the condition of samples received. *See, e.g.*, Appendix B, Toxicology Bureau – Technical Procedures *Implied Consent Worksheet Entry*, part of SLD's SOPs, at App. 3, bullet 2. *Amici* state that without the original analyst, they cannot discover the selection of parameters that will be used to run the test. NACDL Br., p.20. But, at SLD, this selection is not made by an analyst. The SOPs dictate that the parameters will be the same for every blood sample tested because they are selected by the computer program. The parameters are automatically applied via the "BAC.M" method, or computer program, required to be used by the SOPs. This is as objective as it gets.

The fact that the BAC.M method is used can easily be verified because most, if not all, of this and

the other information the *amici* state they cannot obtain without cross-examining the analyst is actually shown on the GC print-out. *See* Appendices C & D, attached, a run-of-the-mill SLD BAC result print-out and the related chromatogram which the print-out describes numerically. No part of either has been redacted. The top portion of each is identical, and described in detail below.

The first line of both reports indicates the computer and its associated program, MSD ChemStation[3], which relate to the GC used for this sample. The date shown is the date the batch of blood samples began to be analyzed by the GC machine. A batch generally consists of 40 to 60 samples run at one time. *SLD Fall/Winter 2010 Newsletter*, p.2. The "0819" is the number assigned by the machine for this entire batch of samples via the Laboratory Information Management System (LIMS), the software program that manages all the GC data. The data file number at line two is this particular sample's file number, which is also created by LIMS. Line three identifies the two flame ionization detector columns utilized.

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[3] While SLD does use ChemStation, the screen shots which appear at NACDL Br., at App. C & E, look nothing like SLD's computer screen. If one reviews NACDL App. C carefully, it is a liquid chromatography (*LC*) screenshot, not a GC screenshot. *LC* is used for substances that do not easily reach gas form, and uses different techniques. The outdated GC shown in NACDL Br., at App. A, is also not applicable. Its autosampler seems accurate.

Amici NACDL posit that they cannot discover whether an analyst left the machine during a test. Br., p.24. First, SLD states that it is ridiculous to think that for a run of many, many hours, sometimes more than a day's duration, the analyst would not be able to leave the machine. Typically, the analyst turns the machine on, and leaves to do other work. In today's lab, the machine generally does the work without much supervision, something like a washing machine left to run through its cycles alone.

The report example shows how confident SLD is that the machine is fully capable of, and often does, work alone. At line four of the report, "Acq On," is the date and time the test results were generated by the GC, 20 Dec 2010 19:31. All lab personnel generally leave the lab by 5:00 p.m. The machine uses military time, so these results were generated on December 20, 2010 at 7:31 p.m. The operator, otherwise known as an analyst, was AnaIsabel Parra ("PARRAAN"). She works until 4:30 p.m. So the GC reached its conclusion about three hours after this analyst left, and two and a half hours after it is likely everyone else left the lab for the day. Should a problem occur, it will be reviewable on the chromatograms and their associated numerical representations generated by the GC. Any analyst, including a so-called surrogate, would be able to see it. All of this information can be discovered through any qualified SLD analyst's testimony and is readily available from the GC data.

The sample number on the report's next line is a barcode number which was placed on the donor's

blood sample kit, and on the gray-topped test tube containing the blood sample tested, immediately upon its arrival at SLD. Gray-topped "vacutainers" contents are standardized, and come prefilled with sodium fluoride as a preservative, and potassium oxalate as an anticoagulant. *See, e.g.*, UC-Irvine Pathology Services description of specimen collection tubes, *available at* http://www.pathology.uci.edu/PathologyServicesManual/SpecTubesContainers.html. They are included in the SLD-approved blood test kits, because they contain sodium fluoride, which is required by SLD rule. *See*, N.M. Admin. Code §7.33.2.15(A)(3).

Below that line is the test number, also assigned by LIMS, which allows the computer to link the test sample to the data file, *i.e.*, this gives the computer a "place" to put the test results generated at 19:31 on December 20, 2010.

The next line indicates that this sample was in vial position 81 when it was put into the autosampler that fed the sample into the GC. On that same line it states: "Sample Multiplier: 1." This shows that this sample was undiluted; therefore, the computer multiplied the results times one, *i.e.*, the results are reported without multiplication necessary.[4]

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[4] Blood samples with results above .40 BAC, and therefore beyond the range of comparison with the highest calibrator (which is .40 g/ 100 mL), are diluted and run through the GC again. *See*, App. B, at App. 4, bullet 2. In that case, the blood is diluted 1:1 with water, and the results would be multiplied by 2.

(Continued on following page)

The following line indicates the nickname for the machine used, which is Ethyl. The other GC sometimes used is called Fred.

Amici claim that the analyst "must interpret their results (called integration)." NACDL Br., p.14. That was true for GCs 20 years ago or so. Today, at least at SLD, the computer does that work. This is indicated at lines 10 and 11, which are the program identifiers for the integration work being done by the GC machine. Line 10, "Integration File signal: events.e" relates to GC Flame Ionization Detector (FID) 1. Line 11, "Integration File signal: events2.e" relates to GC FID 2. It always reads this way. If there were a manual override showing that the analyst did the integration (which is not permitted at SLD) per the key shown at the bottom of the page, an "m" indicating manual integration, would show up beside the results. So if, as supposed by NACDL *amici*, an analyst did manual integration, the report would show it. A different analyst would be able to see that, and be competent to testify about it.

"Quant Time" or quantitation time, is the time that Ms. Parra came back to the lab the next morning, printed out the report, and reviewed the GC's results for this sample. "Quant Method" shows that the GC used the "BAC.M" or blood alcohol concentration method software program to analyze the sample.

The computer does the calculations. All test results, including the original in excess of 40, would be in the file.

If BAC.M had not been used, the report would say something different. "Quant Title" is blood alcohol quantitation. "QLast Update," is the date that the GC machine had last been used for a run before this batch. "Response via: Initial Calibration" shows that all the results for this run were generated off the first five calibrators, which are always the first five vials tested in a batch. *See* Appendix E, BAC example worksheet, which is also part of SLD's blood alcohol testing SOPs, and specifies how the GC autosampler is loaded.

The next line of the report identifies that the software program used was ChemStation, and the machine performing the integration was an HP 6890. This line also states: "Scale Mode: Large solvent peaks clipped." This is never applicable to BAC runs, in which the solvent is always aqueous-based, and cannot produce large *solvent* peaks. Only solvents like methanol produce large solvent peaks. SLD's GC machines used for BAC testing are only used for BAC testing, but the report always states "Large solvent peaks clipped" as a default.

The results section appears as a table after the foregoing information. The results for the internal standard, N-Propanol, are listed first. Appendix C. Then, on the next line, the GC lists a number for a substance identified by it as ethanol. *Id.* Ethanol is in alcoholic drinks.

The numerical representation is the GC's calculation of the quantity of alcohol in this blood sample,

graphically illustrated by the chromatograms in Appendix D, at App. 7. The computer compares the chromatogram of the substance it finds in the sample with that of the internal standard to determine what the substance is. NACDL Br., p.9. Here, the computer noted the retention times of the substance were 1.539 and 2.299. The graphs differ because they are readings from the two different columns in the GC. They vary because the two columns are chemically distinct, and so have different retention times for ethanol and other substances. *Accord,* NACDL Br., p.21. Using two columns that will respond with different retention times operates as a cross-check of the results. *Id.*

Once the GC identified the ethanol, it then determined the concentration of that ethanol by determining the area under the chromatogram peaks, and comparing it to the area of chromatogram peaks for known quantities of ethanol.[5] *Accord,* NACDL Br., p.11. For this sample, the areas shown for each column (which appear on the report as Resp #1 and Resp #2) each related to .135 grams per 100 milliliters of blood, or over 1.6 times the *per se* limit of .08 g/100mL, at which point a person is deemed to be DWI. App. C. Per the SOPs, the two column results must be within that 5% range, or within .005 g/mL, of each other. *See* App. B, at App. 3, bullet 3. If they are

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[5] "N.D." on the lines below ethanol shows the other substances listed were not detected.

within the 5% range, then the quantity reported is always the amount reported by column two. *Id.* The result is never rounded up, and is always truncated to two digits. *Id.*, at bullet 4. So for this sample, the result reported to the donor and the submitting agency on SLD's 705 form would be .13 g/100mL.

Everything stated regarding this sample's results can be reviewed and competently testified to by any SLD analyst. *Amici* claim that without cross-examining the analyst who worked on a particular sample, a defendant won't be able to tell whether the machine was making its calculations properly. But, if the GC isn't working right, it will read the calibrators and controls (for known amounts of ethanol) or blank solutions (100% water) incorrectly. These quality control (QC)[6] items for the entire run are scrutinized for a whole batch of samples. The test results for the QC controls and blanks reviewed on each side of a particular sample will be in the blood donor's file (which also contains the sample's quantitation report including the chromatogram) which analysts review to prepare for trial. The analyst or reviewer (or the defense should they choose to review the file) will be able to see any error in the GC's calculation of the controls or blanks. If these QC items are read incorrectly by the GC, SLD requires that the test be re-done. For purposes of argument only, if

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[6] QC test results are just like the quantitation report for the blood sample explicated earlier, including both the chromatogram and analysis.

the test isn't re-done that, too, would show in the file, and the testifying analyst would see it. The so-called "surrogate analyst" is just as easily questioned on this subject as the original analyst, perhaps more so, having no incentive to gloss over such a mistake because he or she wasn't the one who made it.[7]

Likewise, NACDL *amici* are concerned that the "analyst can tell the computer how to draw the baseline of the peak," which *amici* describe as a wholly subjective task. That peak represents the concentration of the alcohol found, if any. NACDL Br., p.12. But, per its SOPs, SLD analysts are *not* permitted to "override the method and manually redraw the baseline." *Id.* The method is BAC.M, every time, and fully disclosed by the instrument. This is a wholly objective approach. The method used is shown in the Quantitation Report. App. C & D. Any testifying analyst can see it. The defense is always able to get a copy of defendant's file, pursuant to discovery, to verify the method used, and see what the chromatograms look like. Or to read the number that the computer reported was representative of the

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[7] This is offered for purposes of argument only, because SLD vehemently denies that any of its analysts would "fudge" data, and no reviewer would countenance it. To do so would risk SLD's ABFT accreditation. Moreover, like lawyers, SLD toxicologists are subject to ethical rules that prohibit false reporting. American Board of Forensic Toxicology, *Code of Ethics*, *available at* http://abft.org/index.php?option=com_content&view=article&id=56&Itemid=65

chromatogram, in Mr. Bullcoming's case .21, or more than two and a half times the legal limit.

Another example of items the NACDL *amici* believe would impact the BAC result is whether the GC columns have been clipped or replaced. NACDL Br., p.7, fn.7. Clipping column ends relates to older or direct injection GC. At SLD, GC columns are typically replaced every 6 to 8 months or whenever the results of the QC controls become inaccurately read by the GC. Those false results, if the column is not replaced before a sample is analyzed, would show in the QC for the sample's file, and any testifying analyst will be competent to answer questions regarding them.

Appendix E, the SLD worksheet which is part of SLD's SOPs, illustrates another matter that concerns NACDL *amici*: the loading of the autosampler carousel. This SOP dictates how the carousel is loaded, and what controls and water "blanks" are to be placed where. If there were a problem with the computer's calculations, these QC controls would show incorrect results. The carousel is loaded the same way every time per the SOPs, as shown in the worksheet.[8]

Analysts are all trained at SLD to do this SLD's way, to load the carousel one vial at a time, and re-check their work. Yes, it must be done carefully,

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[8] For samples in excess of the number shown on the worksheet, the pattern for loading additional samples and controls follows that of the earlier iterations.

but so must a records custodian work carefully when certifying that a copy provided is complete and accurate. If somehow the problem is not disclosed by the controls (for example, if a blood sample vial is mislabeled and the original analyst did not immediately catch that mistake), the original analyst would no more be able to detect that problem than would any other analyst reviewing the file.

In that case, the only means of finding the error would be re-testing the blood sample, which a defendant may always do if he believes that the results are incorrect.[9] JA 52. Blood samples are retained for six months from the date of receipt to allow a defendant to make such a request. N.M. Admin. Code §7.33.2.15(A)(4-6). That did not happen in this case. JA 52. Of course, there was no reason for Mr. Bullcoming to do so because, as his counsel stipulated, he did not dispute being drunk at arrest. JA 60. Although no questioning of Mr. Razatos addressed it, Mr. Bullcoming's defense involved whether he got drunk before or after the truck accident which occasioned his arrest.

If a problem can be detected from the data, the analyst testifying at trial is effectively acting as an additional reviewer on the case. If it can't, the

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[9] In the few cases of fraud or error cited by Petitioner's *amici* as the basis for reversing this case, the problem was generally only discovered by re-testing the sample. All the laboratories in question appear to be crime labs appended to a law enforcement agency, not independent laboratories like SLD

original analyst is unlikely to know about it either. The Petitioner does not suggest, nor would it be reasonable to require, that every sample be tested multiple times to catch a problem about which even the original analyst would not have known. The best protection for any defendant believing that his or her BAC test result is wrong, is to have the blood timely re-tested at the lab of their choice. The State of New Mexico will even pay for that second test. N.M. Stat. Ann. §66-8-109(E).

II. ENORMITY OF NUMBERS AND ANONYMITY OF BAC TESTING ELIMINATE THE EFFICACY OR NECESSITY OF HAVING A PARTICULAR ANALYST TESTIFY.

Petitioner gives the impression that he thinks a run of blood test vials may be limited to a dozen samples at a time. Petitioner's Br., p.4. Not so. Each batch consists of about 40 to 60 samples identified only by a computer-generated number. *SLD Fall/Winter 2010 Newsletter*, p.2. Therefore, contrary to Petitioner's assertions (Br., p.30, fn.2), it would be unbelievable for an analyst to say they remember any particular run, or the region from which that sample came. Once a sample reaches SLD it is immediately assigned a number. It is not linked to an individual's file in which his or her name appears until all testing is completed. *See*, *SLD Fall/Winter 2010 Newsletter*, p.2 (cases are identified only by a computer assigned barcode number). Once the results are linked back to a file, they are reported both to the

individual tested and to the law enforcement agency. *See*, JA 65.

The lab tests thousands of samples annually, with the 15% increase from the total of over 2500 blood samples in 2008 resulting in nearly 3000 samples tested in 2010. New Mexico Department of Health Scientific Laboratory Division, *SLD Fall/ Winter 2008 Newsletter*, p.4; *SLD Fall/Winter 2010 Newsletter*, p.2. Just dividing the samples evenly among the four analysts currently analyzing BAC for Implied Consent cases amounts to over 700 samples tested by each analyst each year. A reviewer may look at thousands of blood analyses. The sheer number of vials identified only by number essentially guarantees anonymity during testing.

The process' anonymity fully supports the New Mexico Supreme Court's position that any qualified analyst can testify about GC test results even if he or she was not the original analyst. The kind of photographic memory that would be required to remember all of the numbered vials one has tested over the course of a year would be so remarkable as to strain credulity. In other words, wouldn't a defendant's counsel be the first to cry foul were the analyst to say, "Oh yes, I remember testing the defendant's blood sample: Number 2351. I thought it was amazing that the fellow could walk, much less drive!" One speculates that the defense would be disinclined to believe that response, and say the same to the jury. Yet, Petitioner and his *amici* assert that certainly an

analyst could remember any particular sample tested so they might usefully be cross-examined.

Except, reading more carefully, it appears that the NACDL *amici* are not saying precisely that. Instead, they state it would be sufficient for an analyst to be questioned about how he or she "typically conducts the test," presumably because the analyst is so unlikely to remember any particular test. NACDL Br., p.23. As noted earlier, every SLD analyst is trained at SLD to meticulously follow its SOPs, so that any qualified analyst can reliably testify about how another analyst typically does the work. That is exactly what Mr. Razatos testified to at Mr. Bullcoming's trial.

Moreover, the GC reports show the method used, when it was used, and what the results were. By reviewing the individual's file, as every analyst does who testifies, the analyst can see if the work was performed properly.[10] They can review the data, and offer their opinion as to whether the analysis appears accurately reported. And they can accurately describe how any SLD analyst "typically conducts the test," which is what *amici* NACDL assert is constitutionally necessary.

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[10] The NACDL *Amici* raise the unusual test which may, "in their experience" be remembered. Br., p.23. Anything unusual must be documented in the individual's file per SLD SOPs and policy. *See, e.g.*, App. B, at App. 4, bullet 2. If the analyst didn't think it was unusual enough to note, he or she is unlikely to remember, or associate it with, any particular sample tested

As reaffirmed in *Melendez-Diaz*, while the Confrontation Clause's ultimate goal may be to ensure the reliability of the evidence, it is a procedural, not a substantive, guarantee of reliability. *Melendez-Diaz*, 129 S.Ct. at 2536, *quoting Crawford v. Washington*, 541 U.S. 36, 61-62 (2004). The accepted procedure is cross-examination. The New Mexico Supreme Court agreed, and applying those principles decided:

> In this case, Razatos, an SLD analyst, was qualified as an expert witness with respect to the gas chromatograph machine and the SLD's laboratory procedures. Razatos provided live, in-court testimony and, thus, was available for cross-examination regarding the operation of the gas chromatograph machine, the results of Defendant's BAC test, and the SLD's established laboratory procedures. Additionally, Razatos could be questioned about whether the operation of the gas chromatograph machine required specialized skill that the operator did not possess, involved risks of operation that might influence the test results, and required the exercise of judgment or discretion, either in the performance of the test or the interpretation of the results. Because Razatos was a competent witness who provided live, in-court testimony, we conclude that the admission of Exhibit 1 did not violate the Confrontation Clause.

Bullcoming, JA 14.

In short, the New Mexico Supreme Court considered all of the arguments raised by Petitioner and his *amici* here, and determined that Mr. Bullcoming's right to confront the witness against him was fully protected. In reality, the witness against him was the GC and the analysis generated by it, which Mr. Razatos stated he reviewed. JA 49. Mr. Razatos was speaking on behalf of a machine that could not speak for itself. *Bullcoming*, JA . Applying the principles set forth in *Melendez-Diaz*, in light of the facts before it, the New Mexico Supreme Court correctly concluded that the rights protected by the Confrontation Clause were amply safeguarded.

III. PUBLIC POLICY CONSIDERATIONS MANDATE THAT ANY QUALIFIED ANALYST BE PERMITTED TO TESTIFY REGARDING THE GC'S BLOOD SAMPLE ANALYSIS.

SLD's analysts are impartial. The fact that about 10% of all test results show low or no evidence of drugs or alcohol, despite the arresting officer's report that the driver seemed impaired, strongly supports that view. But, SLD does not contend that no witness is necessary to testify on its behalf. Conversely, SLD does not believe that the Confrontation Clause requires that only the original analyst will suffice, because that amounts to a formalistic exercise offering nothing of value to a defendant, and creates a serious danger to New Mexican public safety on its roadways. The State of New Mexico's public policy against driving under the influence of alcohol or

drugs is clear. *See*, Implied Consent Act, N.M. Stat. Ann. §§66-8-105 through 66-8-112 (2010). It is a well-established principle that in some circumstances the right to confrontation must give way to considerations of public policy. *Mattox v. United States*, 156 U.S. 237, 243 (1895). All states have the same interest in regulating road safety. Likewise, they will have the same interest in preserving valid evidence for DWI trials which will be lost absent permitting any qualified analyst to testify regarding GC test results.

Unfortunately, as was true for Mr. Bullcoming's trial, many times the original analyst will not be available.[11] People retire, go on vacation, they're sick, move away, leave the lab's employ for another job, take maternity leave, you name it, and SLD, like any employer, experiences all kinds of employee absences.[12] One very troubling aspect of Petitioner's position that no analyst except the one who did the original

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[11] The record reflects that the original analyst, Curtis Caylor, was on unpaid leave. As an employment matter, SLD may not disclose the reason, but states unequivocally that if Mr. Caylor's analytical work had been doubted, SLD policy is that it would have been rejected, and re-tested prior to trial. Were SLD to try to hide any analyst's poor performance, it would risk its accreditation. ABFT randomly checks files annually to review analysts' work, and should it discover the kind of misfeasance or malfeasance posed by Petitioner's *Amici*, SLD would suffer the consequences.

[12] Analyst Ruth Luthi reviewed Mr. Bullcoming's case, and also did not appear at his trial. JA 58 & 62. Her absence further illustrates the difficulties for SLD in maintaining an immutable workforce.

testing can testify about the GC's work is that if any analyst leaves the lab's employ, and is no longer subject to a court's subpoena powers, as a practical matter it is likely that DWI defendants' cases supported by perfectly valid test results will end up being dismissed.

SLD also encounters samples where the evidence shows that the individual may have been impaired by a number of drugs plus alcohol. If no one drug or intoxicant alone can explain the impairment observed, there could be as many as seven "original" analysts. *SLD Fall/Winter 2010 Newsletter*, p.2. SLD only has four analysts who testify in alcohol-related cases, and six in drug cases. *Id.* So, if the original analysts must testify, then SLD's Toxicology Bureau will be shut down almost completely for one case. Trials tend not to be completed in a day; drug or alcohol batch runs take four days, so the lab may well lose an entire week's work for one trial. *Id.*

Or what if, as is often happens these days, there is more than one trial for which any of those analysts is also subpoenaed? The likelihood of having all analysts available for one trial date seems slim. One or more cases may be dismissed because analysts

cannot be two places at once.[13] While some scoff at the notion that labs will receive that many subpoenas, or that numbers will increase, don't forget that from 2008 to 2010, the number of subpoenas SLD received for testimony in DWI/DUID cases increased by 71%. *SLD Fall/Winter 2010 Newsletter*. In 2010, SLD's Toxicology Bureau received about 1600 subpoenas for testimony, roughly half for alcohol and half for drug cases. *Id.* That amounts to over 200 subpoenas per alcohol analyst and over 133 for each drug analyst. There are only 52 weeks in a year.

IV. SLD'S 705 FORM STATEMENTS ARE READILY VERIFIABLE, SO THE ONLY ISSUE SHOULD BE THE WEIGHT OF THE FORM'S EVIDENTIARY VALUE, NOT ITS ADMISSIBILITY.

The Petitioner argues that allowing an analyst to write the test results he or she reads from the

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[13] SLD believes it an insufficient solution to say that if the defendant cross-examined the original analyst, and the analyst is later unavailable, then a different analyst may testify *See, e g , Melendez-Diaz*, 129 S.Ct. at 2531, *citing Crawford*, 541 U.S. at 54 (2004) In New Mexico, analysts are often only questioned prior to trial in pre-trial interviews (PTIs). *See, e g* , N.M R. Ann. 7-504(C)(1). These are not conducted under oath. They are informal, so their confrontation value is doubtful. Moreover, even if deemed to satisfy confrontation requirements, most PTIs occur immediately before trial. If the original analyst is unavailable then, it will be too late to do anything to rectify the problem. SLD does not control when the defense requests a PTI or how it is conducted.

computer print-out onto SLD's 705 report form (JA 62-65), which is sent to both the test subject and law enforcement agency, is really not different than allowing a person to submit a statement of a house number, or auto license plate they saw, or anything else that might be testified to in a criminal trial. Br., p.12. But, upon reflection, it really is quite different. In those cases, we are entirely dependent on the witnesses' clarity, presence of mind under what may have been frightening circumstances, and their memory to accurately report what they saw. That is not the case for SLD's analysts completing the 705 form.

Unlike the pressure-packed witnessing of a crime, a BAC analyst works in a controlled environment, just like a records custodian. The lighting is good, the environment is safe. Both Mr. Razatos' trial testimony, and the step-by-step review of an actual quantitation report *supra*, demonstrate it is a simple matter to review the GC's printed report and copy the result. The machine does all the work, memorializes exactly how it did it, and provides a numerical result. Twice.

For this reason, the New Mexico Supreme Court was perfectly justified in finding that the analyst who copied the BAC onto the 705 form " . . . was a mere scrivener, and the Defendant's true 'accuser' was the gas chromatograph machine which detected the presence of alcohol in the Defendant's blood, assessed Defendant's BAC, and generated a computer print-out listing its results." *Bullcoming*, JA 13. A defendant

or his attorney can even look at the print-out in the defendant's file, see the number recorded, and check if it corresponds to the number on the 705 form. The file is reviewed by the testifying analyst, and if requested, is provided to the DWI defendant as part of discovery per court rules. *See, e.g.*, N.M. R. Ann. 7-504.

Petitioner complains that the minimal certifications required for every analysis makes the form inadmissible. Br., p.36. SLD strongly disagrees. These statements are of a most routine sort, such as that the analyst conducted a chemical analysis using the GC method. The statements are so basic to the process that they are pre-printed on the form signed by the analyst. *Amicus* Richard D. Friedman states that " . . . Curtis Caylor did far more than transcribe the results indicated by the machine. He also asserted that he received sample [sic] in question with seal unbroken . . . " Br., p.14. Well, actually Mr. Caylor certified that the *laboratory* received the sample with seal unbroken. JA 62. But that was first certified by a different employee, Ms. Yvonne Hautzinger, who took the sample out of the mailbox. *Id.* So, we have that statement twice, from two different SLD employees, Ms. Hautzinger and Mr. Caylor. *Melendez-Diaz* acknowledged that not all uses of a form are prohibited, such as for proving some parts of a chain of custody (which the 705 form clearly provides). 129 S.Ct. at 2532, fn.1. The Court even asserted that something as important as a certification that an instrument is working properly may be

non-testimonial. *Id.* Here, what is important is that statements on the form about the BAC were readily verifiable, other parts could even be considered non-testimonial, and what required live testimony from SLD was competently testified to at Mr. Bullcoming's trial. Therefore, it must survive challenge on constitutional grounds.[14]

The form did not stand alone. It was accompanied by the testimony of a qualified analyst after reviewing the analysis. The jury was correctly allowed to see it. Any defendant may, as Mr. Bullcoming's counsel did, argue the supposed defects of the analyst's testimony. JA 60-61. SLD's 705 form is mailed to the defendant when the BAC results are determined. JA 65. The actual GC's analysis is available for review. If a defendant believes that the 705 form report, or the GC analysis, is wrong, that defendant can require the State to pay for a re-test at another lab. N.M. Stat. Ann. §66-8-109(E).

SLD does not contend that, like a records custodian, no analyst needs to testify to the accuracy of the

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[14] If this Court were to consider the form's admission a violation of hearsay rules, as noted by the Court in *California v. Green*, 399 U.S. 149, 156 (1970), "merely because evidence is admitted in violation of a long-established hearsay rule, does not lead to the automatic conclusion that confrontation rights have been denied."

analytical work.[15] Instead, it is stating that between the ability of the defense to review the GC analysis, and the opportunity to cross-examine a qualified, SLD-trained analyst about the testing process and the data, the interests protected via the Confrontation Clause are amply preserved.

CONCLUSION

The beauty of the U.S. Constitution has been its ability to adapt to vast changes that have taken place since its adoption. SLD is convinced that the Framers could not have intended to impose formalistic constraints that yield no constitutionally cognizable benefit to a defendant, and are likely to cause real harm nationwide. SLD urges this Court not to take an approach to confrontation that disregards reality. SLD believes the GC machine used here eliminates the concerns raised by Petitioner. The work is really done by a machine, and can be reviewed by any qualified analyst just as well as the original. The advanced equipment used, uniformity ensured by SOPs which all SLD analysts must follow, and ability of the defense to cross-examine an analyst who can competently answer questions raised does not create

[15] In many ways this ability to review the data and check the work seems more reliable than a certification by a records custodian. Those statements are not verifiable. Yet, the *Melendez-Diaz* Court approved such certifications. 129 S.Ct. at 2538-2539.

an exception to the Confrontation Clause, but, in fact, satisfies it.

The long-range implications of a contrary opinion must also be understood. Each case should be considered on its merits, as the New Mexico Supreme Court did here. SLD is not expert in other technologies. It does not purport to know whether other methods of forensic analyses are subject to error or manipulation. SLD does know that the GC analysis described here should not be lumped in with forensic methods found untrustworthy. But like the GC used by SLD today, which is much different than that of 20 years ago, other technologies may change as well. Then those technologies may also avoid the pitfalls Petitioner says he fears. This Court should not reach any decision that precludes consideration of that possibility.

For the foregoing reasons, *Amicus Curiae* SLD requests the Court to affirm the New Mexico Supreme Court's decision in this case.

Respectfully submitted,

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APPENDIX A

App. 1

EFFECT OF SODIUM CHLORIDE ON HEADSPACE BLOOD ALCOHOL ANALYSIS BY GC-FID

Janice Yazzie*, Ruth Luthi, Sarah Kerrigan
New Mexico Department of Health, Scientific Laboratory Division, Toxicology Bureau, PO Box 4700, Albuquerque, NM 87196-4700.

Sodium chloride is frequently utilized as an additive for headspace alcohol analysis. The addition of salt to the mixture in the headspace vial increases the partial pressure of volatile compounds including alcohol and the internal standard. This is advantageous because the concentration of alcohol in the vapor phase is a function of both the temperature and the concentration of alcohol in the liquid phase.

The effect of salt was investigated in a series of experiments in which sodium chloride was added to the internal standard solution containing *n*-propanol and *r*-butanol. Ethanol was quantitatively determined using an Agilent HP 6890 GC equipped with dual capillary columns and a flame ionization detector (FID).

In-house and external whole blood controls were used for comparison purposes. When no salt was added, CVs ranged from 1.3 to 4.0% for alcohol concentrations between 0.04 and 0.30 g/dL. By comparison, CVs using the salt solution ranged from 1.2 to 4.2%. Accuracy was 100-105% and 99-109%, when either

[Continued On Next Page]

salt or no salt was added, respectively. A comparison of quantitative values obtained by both methods showed that the results were not statistically different. A total of 80 antemortem and postmortem casework samples were included in the study. These ranged in concentration from 0 to 0.567 g/dL ethanol. Linear regression analysis showed an R^2 value of 0.996 and a mean difference of 0.001 g/dL between methods.

Keywords: Ethanol, Sodium chloride, GC-FID

TOXICOLOGY BUREAU – TECHNICAL PROCEDURES

Discipline: Blood Alcohol Analysis
Method: Blood Alcohol Analysis by Dual Column Capillary Headspace GC
Method #: 803.8

Implied Consent Worksheet Entry

- After the data is printed, enter the alcohol concentrations on the worksheet.
- As you prepare each sample, record any irregularities, conditions, and type of sample (blood, urine, etc.) on the worksheet. Make a notation if the sample is not preserved.
- A single aliquot of sample will be used for all unknown case samples. For all sample results, concentrations should be within 5% of each other on both columns or ± 0.005 g/100mL. Quantitative values are determined using column RTX®-BAC2. The other column (RTX®-BAC1) is used for qualitative confirmation, but may be used for quantitation if necessary. If a control is out of range, the samples on either side of that control will be reanalyzed, unless the sample result is "negative".
- The result is truncated to two digits and recorded on the worksheet. Implied Consent results are reported to 2 decimal places.

[Continued On Next Page]

APPENDIX B

App. 4

- The reporting limit for ethanol, methanol, acetone and isopropanol is 0.01 g/100mL.
- Samples with ethanol concentrations below the reporting limit (0.01 g/100mL) on either column are reported as "negative".
- Samples with concentrations in excess of the high calibrator (0.400 g/100mL) on either column are diluted and reanalyzed.
- Results are entered on the SLD 705 form in two digits. For samples containing no alcohol, enter zero in results section and under comments enter "no alcohol detected, drug results to follow."
- Submit all case folders to the reviewer for approval.

EXAMPLE CALCULATIONS

1. To determine if results from the two columns are within 5% of each other, you may divide the higher BAC value by the lower BAC.

e.g. 0.121/0.111=1.09 Is greater than 5%

APPENDIX C

App. 5

Quantitation Report (Not Reviewed)

Data Path : C:\msdchem\1 ATA\2010_Dec_20_0819\
Data File : 122010081.D
Signal(s) : Signal #1: FID1A.CH Signal #2: FID2B.CH
Acq On : 20 Dec 2010 19:31
Operator : PARRAAN
Sample : 2010207895
Misc : 328497
ALS Vial : 81 (Sig #1); 0 (Sig #2) Sample Multiplier: 1

InstName : ETHYL
Integration File signal 1: events.e
Integration File signal 2: events2.e
Quant Time: Dec 21 07:42:53 2010
Quant Method : C:\MSDCHEM\1\METHODS\BAC.M
Quant Title : Blood Alcohol Quantitation
QLast Update : Wed Dec 15 13:15:37 2010
Response via : Initial Calibration
Integrator : ChemStation 6890 Scale Mode: Large solvent peaks clipped

Volume Inj. :
Signal #1 Phase : Signal #2 Phase :
Signal #1 Info : Signal #2 Info :

	Compound	RT#1	RT#2	Resp#1	Resp#2	Conc#1	Conc#2
	Internal Standards						
1)	n-Propanol	2.300	3.852	5033353	4954503	1.000	1.000
	Target Compounds						
2)	Ethanol	1.539	2.234	2325727	2321560	0.135	0.135
3)	Methanol	0.000	0.000	0	0	N.D.	N.D.
4)	Acetone	0.000	0.000	0	0	N.D.	N.D.
	Isopropanol	0.000	0.000	0	0	N.D.	N.D.
	SemiQuant Compounds – Not Calibrated on this Instrument						

(f) = RT Delta > ½ Window (#) = Amounts differ by > 25% (m) = manual int.

APPENDIX D

App. 6

Quantitation Report (Not Reviewed)

Data Path : C:\msdchem\1 DATA\2010_Dec_20_0819\
Data File : 122010081.D
Signal(s) : Signal #1: FID1A.CH Signal #2: FID2B.CH
Acq On : 20 Dec 2010 19:31
Operator : PARRAAN
Sample : 2010207895
Misc : 328497
ALS Vial : 81 (Sig #1); 0 (Sig #2) Sample Multiplier: 1

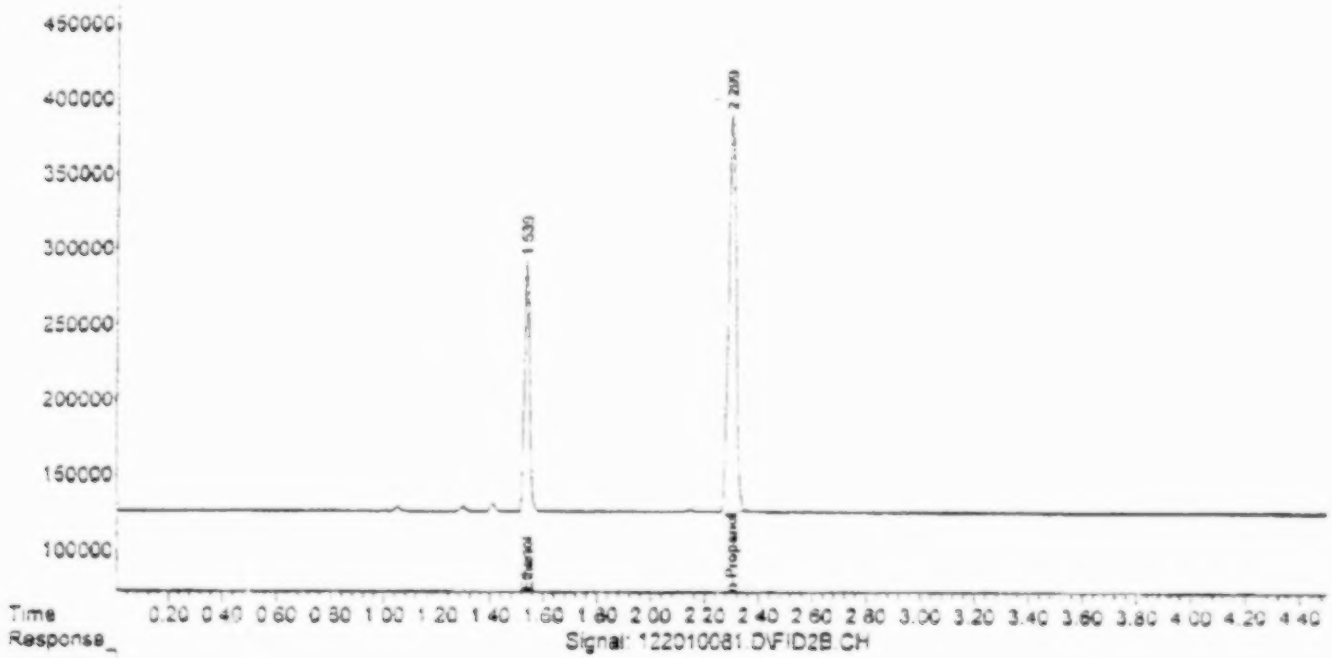
InstName : ETHYL
Integration File signal 1: events.e
Integration File signal 2: events2.e
Quant Time: Dec 21 07:42:53 2010
Quant Method : C:\MSDCHEM\1\METHODS\BAC.M
Quant Title : Blood Alcohol Quantitation
QLast Update : Wed Dec 15 13:15:37 2010
Response via : Initial Calibration
Integrator : ChemStation 6890 Scale Mode: Large solvent peaks clipped

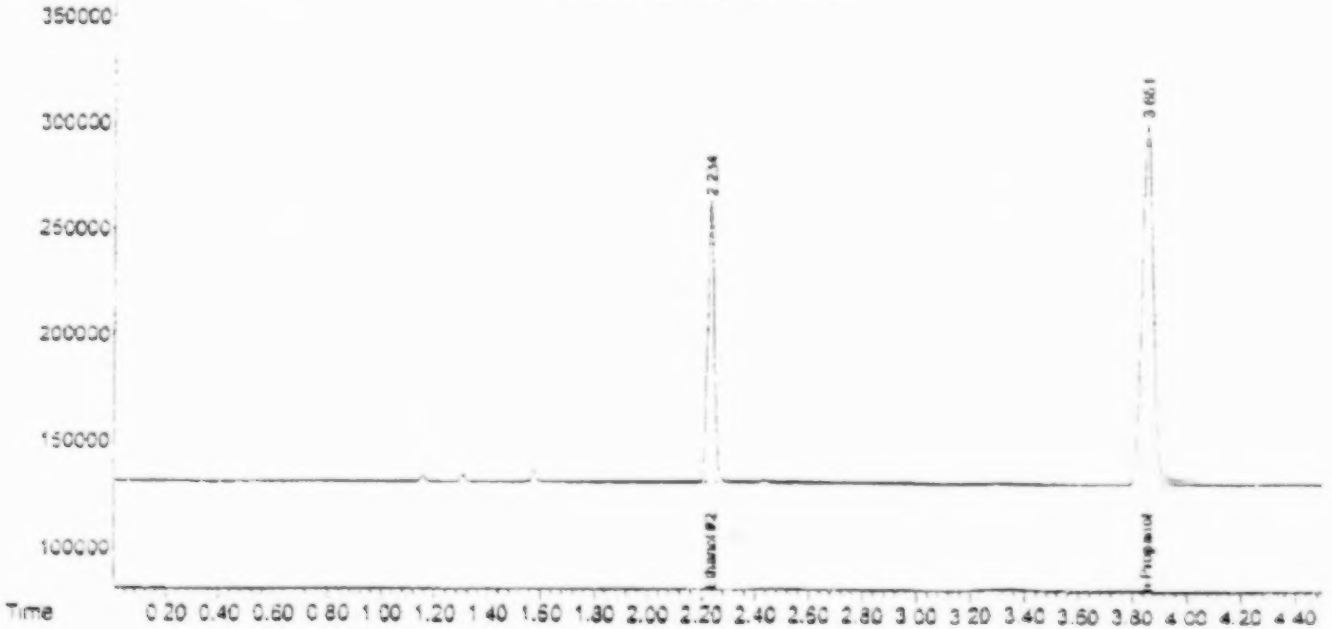
Volume Inj. :
Signal #1 Phase : Signal #2 Phase :
Signal #1 Info : Signal #2 Info :

[Quantitation Report Continued On Next Page]

APPENDIX D

App. 7





APPENDIX E

App. 8

TOXICOLOGY BUREAU – TECHNICAL PROCEDURES

Discipline: Blood Alcohol Analysis
Method: Blood Alcohol Analysis by Dual Column Capillary Headspace GC
Method #: 803.8

Example Worksheet for IC blood alcohol analysis:

Position Number	Sample Type	Description
1	Calibrator	0
2	Calibrator	0.010
3	Calibrator	0.050
4	Calibrator	0.100
5	Calibrator	0.400
6	**Control**	**WB**
7	**Control**	**Cerilliant 0.100**
8	**Control**	**Cerilliant 0.300**
9	**Control**	**Cerilliant 0.300**
10	**Control**	**Blank 1**
11	**Control**	**0.030**
12	**Control**	**0.350**
13	**Control**	**Cerilliant 0.040**
14	**Control**	**Cerilliant 0.080**
15	**Control**	**Blank 2**
16	Unknown	Case 1
17	Unknown	Case 2
18	Unknown	Case 3
19	Unknown	Case 4
20	Unknown	Case 5

[Continued On Next Page]

APPENDIX E

App. 9

21	**Control**	**Cerilliant 0.100**
22	**Control**	**Blank 3**
23	Unknown	Case 6
24	Unknown	Case 7
25	Unknown	Case 8
26	Unknown	Case 9
27	Unknown	Case 10
28	**Control**	**Cerilliant 0.200**
29	**Control**	**Blank 4**
30	Unknown	Case 11
31	Unknown	Case 12
32	Unknown	Case 13
33	Unknown	Case 14
34	Unknown	Case 15
35	**Control**	**Cerilliant 0.300**
36	**Control**	**Blank 5**
37	Unknown	Case 16
38	Unknown	Case 17
39	Unknown	Case 18
40	Unknown	Case 19
41	Unknown	Case 20
42	**Control**	**Cerilliant 0.100**
43	**Control**	**Blank 6**
44	Unknown	Case 21
45	Unknown	Case 22
46	Unknown	Case 23
47	Unknown	Case 24
48	Unknown	Case 25
50	**Control**	**Cerilliant 0.200**
51	**Control**	**Blank 7**
52	Unknown	Case 26
53	Unknown	Case 27
54	Unknown	Case 28

[Continued On Next Page]

APPENDIX E

App. 10

55	Unknown	Case 29
56	Unknown	Case 30
57	**Control**	**Cerilliant 0.300**
58	**Control**	**Blank 8**
59	Unknown	Case 31
60	Unknown	Case 32
61	Unknown	Case 33
62	Unknown	Case 34
63	Unknown	Case 35
64	**Control**	**Cerilliant 0.100**
65	**Control**	**Blank 9**
66	Unknown	Case 36
67	Unknown	Case 37
68	Unknown	Case 38
69	Unknown	Case 39
70	Unknown	Case 40
71	**Control**	**Cerilliant 0.200**
72	**Control**	**Blank 10**